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JUSTICE DELAYED: THE HUMAN COST OF REGULATORY PARALYSIS

HEARING

BEFORE THE

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FEDERAL RIGHTS AND AGENCY ACTION

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"The Pathology of Privilege: The Economic Consequences of Government Favoritism" by Matthew Mitchell; available at http://mercatus.org/sites/default/files/Mitchell_PathologyofPrivilege_v3_1.pdf

JUSTICE DELAYED: THE HUMAN COST OF REGULATORY PARALYSIS

THURSDAY, AUGUST 1, 2013

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT, FEDERAL RIGHTS, AND AGENCY ACTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2 p.m., in Room SD–226, Dirksen Senate Office Building, Hon. Richard Blumenthal, Chairman of the Subcommittee, presiding.

Present: Senators Blumenthal, Whitehouse, and Hatch.

OPENING STATEMENT OF HON. RICHARD BLUMENTHAL, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Chairman BLUMENTHAL. Good afternoon and welcome, everyone, to this first hearing of a new Subcommittee, and our subject this afternoon, "Justice Delayed: The Human Cost of Regulatory Paralysis," is one that I think is fundamentally about the rule of law. I do not know anyone more dedicated to the rule of law than the Ranking Member of this Subcommittee, Orrin Hatch. Senator Hatch has been a longstanding advocate of effective, fair, impartial enforcement of the law, and so I am particularly pleased to be working with him and want to thank him and his staff for his cooperation in making this hearing happen on the verge of our recess.

Senator HATCH. Well, thank you, Mr. Chairman.

Chairman BLUMENTHAL. And as our Chairman, Senator Leahy, mentioned this morning, this is the time in the legislative process when the fumes of gasoline for jets fill the hallways and prompt us to be especially mindful about time. And we may have a vote at 3, but I would like to begin as soon as possible and just say I appreciate our first witnesses being here, and I am going to swear you in in just a moment. But I will make a brief statement and then turn to Senator Hatch.

Every year in Connecticut, we gather in Bridgeport for a very solemn ceremony to remember the victims of L'Ambiance Plaza, who were workers on that day, more than 20 of them, who perished—28 workers who perished on that day because of a method of construction known as "lift slab." Lift slab was a patented construction technique designed to achieve maximum speed at minimum cost, and it involved casting large slabs of concrete and then literally lifting them to create floors and ceilings and putting them in place using hydraulic lifts.

On April 23rd, one of the slabs broke, destabilizing the whole structure, which was partially built, and burying, literally burying 28 workers, who left their homes that morning saying goodbye to their families, expecting to return home, having plans for the spring and the summer, and never coming back.

Now, the workers who died that day were victims of bad engineering, but they were also victims of bad policy, because more than 5 years before the L'Ambiance tragedy, the Occupational Safety and Health Administration actually released an Advanced Notice of Proposed Rulemaking on lift-slab construction. The agency has recognized that lift-slab construction created special risks and needed special regulations under its existing authority, under its obligation to enforce that authority and use the law to protect people. And over the 5 years following that notice, OSHA opened and closed two comment periods and held one public meeting but produced no rule.

The final rule ended lift-slab construction. It came 3 years after L'Ambiance Plaza, too late for those 28 people who died needlessly and tragically on that day.

We are here about L'Ambiance Plaza but much more, because many other rules and many other rulemaking procedures have been needlessly delayed—maybe not as long as the 8 years that it took OSHA to issue that rule that banned lift-slab construction, but much too long and with tragic costs for many, many Americans.

Today we are here about delays in justice in the regulatory process that affect millions of Americans who depend on clean water and clean air, on safe products, who depend on enforcement of the law when they go to work or come home, use appliances, and run their cars.

In a recent study of three key Environmental Protection Agency programs, the Competitive Enterprise Institute found that 98 percent of EPA rules since 1993 have been promulgated late by an average of 2,072 days after their statutory deadline.

Now remember, these deadlines are not just about it would be nice if you get these regulations done. They are often, more commonly than not, a matter of statutory deadline.

The various agencies responsible for implementing the Dodd-Frank Act have missed 62.7 percent of the 279 statutory deadlines that have passed so far. As of a recent report, 136 draft rules from executive agencies were under review at the White House, and of them, 72 had been held for longer than the 90-day statutory limit set by the relevant Executive order; 38 had been under review for more than a year, including 24 from 2011 and 3 from 2010.

The White House has made tremendous progress. OIRA has issued some regulations more recently. I want to commend that progress. But I go through these numbers because they have a reality to American life that I think is undeniable, and they are essential to public trust and confidence in the law.

I know about costs and benefits and the importance of considering them. I know about the importance of listening and the importance of doing it. I believe in listening and weighing cost/benefits and quantifying the results of the regulatory process. But very simply, my belief is we can do better, and that is our goal—again, not only because of the impacts on human safety and quality of life

as well as health, but also because it is vital to confidence and trust in the rule of law. And to us as a legislative body, it ought to be a matter of personal pride. We work very hard. We have a lot of debate. We disagree and then we come to a consensus in making a law. And then to have it unenforced or ignored ought to be considered an affront professionally and also as a matter of democratic process.

So we are beginning. This hearing is our first—I hope that we will have others—to consider the specific areas of enforcement that deserve attention and, again, I just really want to thank our Ranking Member Senator Hatch for his longstanding commitment to the principles that underlie this hearing and his very important help in being here today.

Senator Hatch.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I am proud of you and very pleased to be able to work with you on this Committee. This is a Subcommittee that really can make a difference in the lives of many people and in the safety of their lives. We have been working productively together on the full Judiciary Committee, and I look forward to doing so in our roles here on this Subcommittee.

As I think the witnesses in the record from this hearing will confirm, there are very different perspectives on the costs and benefits of regulation. More specific to the title of this hearing, there are human costs from regulatory excess as well as from regulatory paralysis. Some see delays; others see a process that can produce better quality results. There may be costs to the quality of regulations from a process that is unnecessarily hastened or artificially driven by political considerations. Some focus on individual regulations that can impose benefits or costs on discrete populations or even on individuals.

But the aggregate accumulation of regulations can increase costs, even significant human costs, on virtually all of our fellow citizens.

A senior citizen, for example, may, on the one hand, benefit from regulations that improve the quality of her prescription drugs but, on the other hand, find that her retirement savings are insufficient because regulatory burdens undermine economic growth during her working life.

I think that the witnesses here today bring these different views and perspectives, and we are really grateful to all of you for showing up and helping us to understand this better.

Once again, Mr. Chairman, I want to thank you for your courtesy and fairness in putting together this hearing, and I look forward to hearing from the witnesses and, of course, working with you in the future on future hearings as well.

Chairman BLUMENTHAL. Thank you, Senator Hatch.

Let me introduce the witnesses and then swear them in, and then we will hear from you individually.

Rena Steinzor is a law professor at the University of Maryland Francis King Carey School of Law and president of the Center for Progressive Reform. The Center for Progressive Reform was found-

ed in 2002 and is a network of 60 scholars across the Nation dedicated to protecting health, safety, and environment through analysis and commentary. She has written very widely and extensively. Her most recent book, published by the University of Chicago Press, is entitled, "The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment," co-authored with Professor Sidney Shapiro, of Wake Forest School of Law.

Sam Batkins is the director of regulatory policy at the American Action Forum. He focuses his research on examining the rulemaking efforts of administrative agencies, and his work has appeared in the *Wall Street Journal*, the *Washington Post*, the *New York Times*, *Reuters*, *Politico*, among other publications.

Peg Seminario is director of occupational safety and health for the AFL–CIO. She has worked for the AFL–CIO since 1977, and since 1990 has been responsible for directing that organization's program for safety and health, and she has worked on a wide variety of regulatory and legislative initiatives at the federal and State levels.

Dr. Patrick McLaughlin is a senior research fellow at the Mercatus Center at George Mason University. His research focuses on regulations and the regulatory process with additional interests in environmental economics, international trade, industrial organization, and transportation economics. And he has published widely in the fields of law, economics, public choice, environmental economics, and international trade.

Janette Fennell is president and founder of KidsAndCars.org. She is recognized as a national leader on health and child safety as it relates to dangers children face in and around motor vehicles, with an in-depth specialty regarding events that take place off public roads and highways, most commonly referred to as "non-traffic accidents" or "incidents." Ms. Fennell has testified before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce, and she, too, has written extensively.

We welcome you all today, and I am going to ask you to please stand and be sworn, as is the custom of the Judiciary Committee. Do you affirm that the testimony that you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. STEINZOR. I do.

Mr. BATKINS. I do.

Ms. SEMINARIO. I do.

Mr. MCLAUGHLIN. I do.

Ms. FENNELL. I do.

Chairman BLUMENTHAL. Thank you. Professor, maybe we can begin with you and then go across the table.

STATEMENT OF RENA STEINZOR, PRESIDENT, CENTER FOR PROGRESSIVE REFORM; PROFESSOR, UNIVERSITY OF MARYLAND CAREY SCHOOL OF LAW, BALTIMORE, MARYLAND

Ms. STEINZOR. Mr. Chairman, Ranking Member Hatch, and members of the Subcommittee, I appreciate the opportunity to testify.

The Subcommittee deserves tremendous credit for airing the truth about the public health regulations that agencies are writing as directed by Congress. The costs of delay are as real as they should be unnecessary, given the clear mandates of the law. Unfortunately, the overwhelming clout of Fortune 100 companies and their relentless, self-serving effort to ignore the great benefits provided by these essential protections has dominated the airwaves. This hearing is a most welcome effort to achieve some balance.

One does not need to look far to see why regulations are essential. Just ask anyone whose life was saved by a seat belt, whose children escaped brain damage because the EPA took lead out of gas, who turns on the faucet knowing the water will be clean, who takes drugs for a chronic illness confident the medicine will make them better, who avoided having their hand mangled in machinery on the job because an emergency switch was there to cut off the motor, who has taken their kids on a trip to a heritage national park to see a bald eagle that was saved from the brink of extinction. The list goes on and on.

The EPA's regulations are among the most beneficial safeguards the U.S. regulatory system has ever produced. Remember that we have reached the point where children and the elderly are routinely warned not to go outside on Code Red days when the weather is hot and the smog levels unhealthy. It is reminiscent of living in a Mad Max movie. Clearly we have no time to waste in setting EPA free to do its job.

An analysis assessing Clean Air Act regulations found that in 2010 these rules saved 164,300 adult lives and prevented 13 million days of work loss and 3.2 million days of school loss due to pollution-related illnesses such as asthma. By 2020, if additional rules are issued promptly and Congress resists shrill demands that it derail them yet again, the annual benefits of these rules will include 237,000 adult lives saved as well as the prevention of 17 million work loss days and 5.4 million school loss days.

Even the most conservative practitioners of cost/benefit analysis, including John Graham, President Bush's regulatory czar, acknowledge what an amazing bang for the buck these regulations deliver in relationship to the costs they impose.

Conversely, because Clean Air Act regulations have been so long delayed—after all, Congress passed the Clean Air Act Amendments in 1990, and we sit here 23 years later—thousands of additional lives have been lost, hundreds of thousands of people have had heart attacks and visited the hospital because of respiratory illness, and people have lost millions of days off work and out of school.

Instead of acknowledging that they have reached the end of the line on delaying tactics that are within the law, the owners and operators of coal-fired power plants, chemical production facilities, oil companies, and motor vehicle manufacturers have shifted focus to the fraught world of polarized politics that you know only too well. These efforts have turned what should be an expert-driven, science-based process for formulating public policy into a blood sport, with the party able to spend the most money becoming the most likely to win. Nothing less than the future integrity of the administrative process is at stake.

In fact, several of my students are in the audience today, and I am pained to tell you that when they study health, safety, and environmental regulation, they are learning more about scofflaw than law. They see that when Congress votes on a piece of legislation by overwhelming margins—the Senate approved the 1990 Clean Air Act amendments by a margin of 89 to 10—everything you write down as an apparently ironclad mandate is far from certain to become reality. They see that instead of trying to muster enough votes to repeal a law, regulated industries have learned to go underground and sabotage it, in the process doing irreversible damage to the credibility not just of the EPA, but of the Senate and the House, and ultimately the rule of law in this country.

Industry lobbyists characterize the Clean Air Act rules that have finally reached the end of the pipeline as a "train wreck" dreamed up by Lisa Jackson, EPA Administrator in President Obama's first term. But Ms. Jackson did not take a trip to the basement of her office building and get drunk on her own whiskey, writing down her best fantasies for torturing the industry. Rather, she did her best—at long last—to satisfy congressional mandates instructing her agency to impose more stringent controls on power plants, automobile fuel, boilers, et cetera. Fighting through the considerable resistance confronting her at the White House, resisting last-minute threats by industries that had successfully battled against this day of reckoning for 2 decades, Ms. Jackson tried to do no more and no less than what Congress told her agency to do.

The truth is that these rules, and the civil servants who write them, do not sweep industry's hard-earned money into a pile and set it on fire for no good reason. The regulations impose costs, but they also deliver tremendous benefits.

Just like the controls on smoking you have championed throughout your career in Congress, Senator Hatch, the chemical and manufacturing sectors have fought these important rules with a disinformation strategy that should sound quite familiar: disputing the danger of air emissions of smog and toxic chemicals and distorting the content of the rules the EPA has imposed. This Subcommittee, with its jurisdiction over the effective and efficient implementation of the law, is well positioned to investigate this record and help get the administrative process back on track.

Thank you.

[The prepared statement of Ms. Steinzor appears as a submission for the record.]

Chairman BLUMENTHAL. Thank you, Professor Steinzor.

Mr. Batkins.

STATEMENT OF SAM BATKINS, DIRECTOR, REGULATORY POLICY, AMERICAN ACTION FORUM, WASHINGTON, DC

Mr. BATKINS. Chairman Blumenthal, thank you, Ranking Member Hatch. I would like to start by making three basic points.

Regulatory growth has peaked in recent years, with 100 major rules in 2010, which was a record. Many of these regulations have little to do with protecting public health, and some regulations admittedly cause environmental dis-benefits. And, finally, proper oversight is the standard practice across the globe for regulatory policy. A regulatory system that creates 10.3 billion hours of paper-

work can cause needless delays for veterans, immigrants, and countless American businesses, even with the current oversight that we do have.

So if we put regulation in perspective, during the last 4 years we have issued more than 330 major regulations, those with an economic impact of more than $100 million. Our paperwork burden, as I have mentioned, the amount of time Americans spend filling out federal forms, is 10.3 billion hours. In that time, it would take more than 5.1 million employees working 2,000 a years to complete the required paperwork.

Now, much of this talk on regulations stems from 2010 when the Federal Government issued 100 major rules. That same year Congress passed 129 private sector mandates and 86 unfunded mandates on States, also records. These legislative mandates, as we all know, are now working their way into the regulatory system. OIRA reported that Fiscal Year 2012 was the costliest year on record, and despite these costs, OIRA did not report record benefits, although it did report large benefits. A large portion had nothing to do with protecting clean air, water, or reducing greenhouse gases. Instead, some benefits arose from altering consumer preferences for the purchase of goods. With the Federal Government managing more than 9,100 different collections of information, our current regulatory burden consumes far more than just clean air, water, and worker protection.

Beyond the top-line figures that I have mentioned, there are, of course, human costs to these numbers. If you are a veteran trying to manage VA's 7 million hours of paperwork, or a potential American citizen making your way through the 116 different Customs and Immigration forms, an ossified regulatory system can have a profound impact.

Take the 380 people now without a job at the Hatfield's Ferry Power Plant in southwest Pennsylvania. Four years before the plant closed, it invested $650 million in scrubbers to reduce mercury and sulfur emissions. When the MATS rule was finalized, the plant was faced with another bill for $900 million. This time, increased regulation, in concert with market trends, forced the plant to close.

These rules doubtless have benefits, but even current EPA Administrator Gina McCarthy admitted last year to the House Energy and Commerce Committee that, "No one has ever denied that our regulations are not a factor in retiring power plants."

On regulation, as with any matter in Government, I believe that getting it right the first time is important. One example is EPA's recent biomass-based diesel rule. EPA admitted the rule would cost $52 million in environmental dis-benefits from dirtier air and dirtier water. EPA noted the impacts on water quality would be "directionally negative." OIRA did review this rule, but I think many are puzzled why EPA would issue a regulation that would cause environmental harm. I think it underscores the importance of thorough regulatory oversight.

And it is not just the U.S. that reviews agency rulemakings. The OECD recommends that all of its members establish mechanisms and institutions to actively provide oversight of regulatory policy.

South Korea, Portugal, and the United Kingdom all have oversight. The U.K., for example, removes two regulations for every new rule.

Now, the issues we have highlighted here today are indeed ones of life and death, financial security, recession, employment, and unemployment. Regulators are issue area experts, but they are not soothsayers. They can plan based on their assumptions, but planned solutions might not always be superior.

To address this planning paradox, Indiana recently passed a measure to review regulations 5 years after their effective date, reviewing for consumer protection, costs, benefits, the environment. We should get regulation right the first time and then examine its effectiveness to ensure the rule is working as designed.

Every President since Jimmy Carter has issued an Executive order on regulatory reform and oversight, not because some large special interest made them but because they wanted a regulatory system that protects public health and fosters economic growth—two goals that we know are not mutually exclusive. Despite these commendable past efforts, it is clear that I think we can do more to examine regulatory policy.

So, again, I am pleased to appear before the Committee today, and I look forward to taking your questions.

[The prepared statement of Mr. Batkins appears as a submission for the record.]

Chairman BLUMENTHAL. Thanks very much, Mr. Batkins.

Ms. Seminario.

STATEMENT OF PEG SEMINARIO, DIRECTOR, SAFETY AND HEALTH, AFL–CIO, WASHINGTON, DC

Ms. SEMINARIO. Chairman Blumenthal, Ranking Member Hatch, thank you very much for the opportunity to testify today on the human costs of delays in regulatory protections. In particular, thanks to you, Chairman Blumenthal, for scheduling this hearing to look at the impacts of the failure in the regulatory system.

During the 36 years that I have had the privilege to work at the AFL–CIO, I have participated in dozens of rulemakings at the Occupational Safety and Health Administration, rules dealing with asbestos, lead, benzene, and other hazards. One of the benefits of my long tenure is that I have witnessed firsthand how these rules have made a difference in preventing injuries and illnesses and saving workers' lives.

But at the same time, over that long work time, I have seen the system and process for developing and issuing worker safety rules devolve from one that worked to produce needed rules in a relatively timely manner to the current broken and dysfunctional system which is failing to protect workers and costing them their lives.

The Occupational Safety and Health Act, passed in 1970, promises workers the right to a safe job. And since the law was passed, great progress has been made because of the statute and its implementing regulations. The job fatality rate has been cut by more than 80 percent, the job injury rate by nearly 70 percent. And there have also been significant reductions in workplace exposures to hazards like asbestos, lead, and benzene as a result of these rules.

But despite this progress, the toll of workplace injury, illness, and death in the United States remains enormous. In 2011, nearly 4,700 workers were killed on the job, and more than 3.8 million workers were injured. An estimated 50,000 additional workers died from occupational diseases like lung cancer from asbestos.

Some groups of workers, including Latino workers and immigrant workers, are at much greater risk, experiencing higher fatality and injury rates than other workers. And the cost of job injury, illness, and death is staggering. It is estimated at over $250 billion a year.

Now, workers' compensation covers some of these costs, but only about 21 percent. The rest of these costs are borne by workers themselves or society as a whole through private health insurance, Medicare, Medicaid, and Social Security Disability.

Over the years there have been added layers and layers of regulatory requirements, which, in my view, have crippled the regulatory system. During the first decade of OSHA, the promulgation of rules from start to finish took 1 to 3 years, and major rules were produced on asbestos, vinyl chloride, cotton dust—a whole host of hazards—under both Republican and Democratic administrations. There were challenges and objections from industry to most rules, but most of these objections were largely about how stringent the rule should be, not over the issue of whether the regulation was needed.

But over the years, as opposition to regulations increased, there were calls for more analyses and considerations of the impact of rules, particularly their costs, and more and more requirements were added to the rulemaking process through legislation, Executive orders, and other directives. And all of these requirements have added significant delay to the regulatory process and increased the costs of developing rules.

A 2012 GAO study on OSHA rules found that the average time for developing and issuing major OSHA rules was 8 years, similar to the time period for the lift-slab rule which Chairman Blumenthal referred to earlier. And this did not include rules that were still pending, many of which have taken much longer.

One of the main sources of delay in rules at the present time is the interference from OMB and delays by OMB in review of rules under Executive Order 12866. Since 2011, virtually every worker protection rule that has been submitted to OIRA for review has been delayed, and most of them are still there. The worst case has been for OSHA's draft proposed silica standard, which has been held by OMB since February 2011, 2½ years.

The delays that we see in the regulatory process and the failure to issue needed rules are costing workers their lives. I presented several examples in my testimony, and let me just talk briefly about two of them.

OSHA's rule on crane and derricks—In 2002, OSHA initiated a rulemaking to update an obsolete construction safety standard for cranes and derricks. There was agreement between industry and labor that a new rule was needed to deal with this hazard which was causing severe injury and multiple deaths.

The rule was developed through a negotiated rulemaking process in which labor, management, and the Government participated,

and within a year's time, they drafted the text of a proposed rule, which everyone agreed on, and delivered it to OSHA in 2004. And there the rule sat, and nothing was done.

And then in 2008, there were a series of deadly crane collapses in New York, Miami, and Texas, which claimed over a dozen workers' lives, and that spurred the rulemaking. And, finally, in 2010, the rule was issued. But it is really inexcusable that for a rule that there was total agreement on that it took more than 8 years, and workers had to die for this rule to be issued.

Silica, a serious workplace hazard that has been recognized, its hazard have been recognized for centuries, a hazard that is in need of regulation. OSHA started working on this rule back in 1997. Today, in 2013, we still do not have a proposed rule. The draft rule has been at OMB for 900 days, and the Executive Order allows a maximum of 120 days. The failure to regulate silica has allowed uncontrolled exposure and more unnecessary death and disease.

In conclusion, we have a regulatory system which is broken, imposing requirements on agencies that are difficult to meet, that are causing extreme delay, that are costing workers, costing the public their lives. We encourage the Congress to look at the sources of these delays and take action to fix this terribly broken system.

Thank you.

[The prepared statement of Ms. Seminario appears as a submission for the record.]

Chairman BLUMENTHAL. Thank you very, very much.

Dr. McLaughlin.

STATEMENT OF PATRICK A. MCLAUGHLIN, PH.D., SENIOR RESEARCH FELLOW, MERCATUS CENTER, GEORGE MASON UNIVERSITY, ARLINGTON, VIRGINIA

Mr. MCLAUGHLIN. Chairman Blumenthal, Ranking Member Hatch, thank you for inviting me to testify.

One focus of this hearing is the human costs of rulemaking delay. I applaud the Committee's concern over how the often obscure regulatory process can lead to real human costs—costs measured not just in dollars but in human lives.

The regulatory process in the U.S. creates human costs in more ways than can be covered in this testimony. I will cover three.

First, the accumulation of regulations stifles innovation and entrepreneurship, slowing economic growth and reducing household income.

Second, the unintended consequences of regulations are particularly detrimental to low-income households, resulting in costs to precisely the same group that has the fewest resources to deal with them.

Third, the quality of regulations matters. Agencies sometimes rush regulations through the crafting process. That can lead to poor execution and poor quality, which in turn incurs very real human costs.

Careful consideration of regulatory options can help minimize the costs and unintended consequences that regulations incur. If additional time can improve regulations in this regard, then additional time should be taken.

By design, regulations restrict choices. These restrictions have accumulated for decades, exceeding 1 million in the year 2010. What does this accumulation of restrictions have to do with human costs? The accumulation of restrictions inhibits innovation. Would-be entrepreneurs are sometimes prohibited from creating a new product that could improve consumers' quality of life or even save lives. And this loss of innovation negatively effects economic growth. An academic study found that between 1949 and 2005, the accumulation of federal regulations has slowed economic growth by an average of 2 percent per year. An average reduction of 2 percent over 57 years translates into an annual loss of about $277,000 per household. That is a very substantial reduction in the abilities of households to purchase necessities, like housing and clothing.

There is another human cost of regulation to consider. Regulations can be regressive, particularly in their effects on prices. When regulations force producers to use more expensive production processes, some of those cost increases are passed along to consumers in the form of higher prices. For example, in 2005 the Food and Drug Administration banned the use of chlorofluorocarbons as propellants in medical inhalers, such as the inhalers that millions of Americans use to treat asthma. Since the implementation of that ban, the average price of asthma inhalers has tripled. To individuals with high incomes, the tripling of the price of inhalers may not have even registered. But to people with low incomes, the higher price may lead to the choice to not buy an inhaler and instead leave the asthma untreated—potentially leading to a real human cost if the person suffers an asthma attack without an inhaler available.

As a society, we are often willing to sacrifice some economic growth in exchange for regulations if they can address an otherwise unfixable problem. But it takes time to discern what option can yield the most bang for the buck, and picking the wrong approach risks sacrificing a lot.

This is why every administration for the past 4 decades has required some form of economic analysis of regulations prior to their implementation. Among other things, a good economic analysis of a regulation first determines whether there is evidence that some otherwise unfixable problem actually exists and then weighs the pros and cons of various approaches to fixing that problem.

Several years ago, a colleague and I launched a project called the "Regulatory Report Card" that systematically rates the quality of those economic analyses of regulations. Using the data from that project, scholars have come up with a few insights that are relevant to this hearing.

First, both statutory deadlines and shorter review times at OIRA are associated with lower-quality regulatory analyses.

Second, the overall quality of regulatory analyses leaves much to be desired: the average score was 31.2 out of 60 possible points—barely 50 percent.

Third, the quality of analyses accompanying several interim final regulations created in 2010 to quickly implement the Affordable Care Act was even worse than that overall average I just cited.

If you are concerned with the human costs of regulations, you should be concerned that regulatory analyses are poorly performed.

One reason that the regulatory analyses of the interim final regulations related to the Affordable Care Act scored so poorly, for example, was that the analyses often ignored more effective alternatives. A better analysis might have led to a better regulation and therefore lowered its human costs.

It is worth considering what forces are contributing to this failure. Given that both statutory deadlines and shorter review times are associated with lower-quality analyses, perhaps such deadlines and pressures to quickly produce a final rule should be reconsidered.

In closing, I will reiterate a dilemma created by our regulatory system. On the one hand, regulations are consistently accumulating. On the other hand, we cannot have confidence agencies are making the best regulatory choices because their analysis is unsatisfactory. In general, regulations are costly. Poorly executed regulations are even costlier. Scholars and legislators have put forth many ideas to improve the quality of regulations coming out of our regulatory system. Perhaps the easiest idea to understand and implement is this: If time can improve regulations, then time should be taken.

Thank you.

[The prepared statement of Mr. McLaughlin appears as a submission for the record.]

Chairman BLUMENTHAL. Thank you, Dr. McLaughlin.

Ms. Fennell.

STATEMENT OF JANETTE E. FENNELL, PRESIDENT AND FOUNDER, KIDSANDCARS.ORG, BALA CYNWYD, PENNSYLVANIA

Ms. FENNELL. Good afternoon. My name is Janette Fennell, and I am the founder and president of a nonprofit organization called "KidsAndCars.org." Thank you very much, Mr. Chairman and Ranking Member Hatch, for holding this important hearing and for the opportunity to address this Subcommittee about the need for issuing the rear visibility standard.

In 1996, after my family had been kidnapped at gunpoint and locked in the trunk of our vehicle, we were able to use this very traumatic experience to help guide the federal regulatory process to ensure that no one else had to end up in the trunk of their vehicle without a way to escape. Now, all vehicles 2002 or newer come with a glow-in-the-dark internal trunk release as standard equipment. Though we are proud of that accomplishment, the most important lesson we continue to learn every day is that these simple changes to vehicles save lives. In fact, not one person has died in the trunk of a vehicle equipped with an internal trunk release mechanism. Not one.

I founded KidsAndCars.org, and one of the first issues we worked on was the issue of children being backed over and killed. By studying the number of deaths, it was clear that educating parents and caregivers about the importance of always looking behind and around their vehicle before moving it would not be enough. Young children are very impulsive, and they do not have the cognitive ability to understand when they are putting themselves in harm's way. When a child follows a relative outside just to get another

kiss from Grandma and stands behind that vehicle, that extra kiss should not cost that child their life.

I find it just as amazing today as I did the first day that I learned our country does not have a regulation about what a driver should be able to see when they are backing up their vehicle. As hard as that is to believe, it is simply a fact.

All of our vehicles are required to have a rearview mirror but not a rear view. I am quite sure that no one would purchase a vehicle if they could not see 20 to 30 feet moving forward, yet we have all been purchasing defective vehicles that do not provide you with the ability to see what is behind you when you are backing.

Every vehicle has a "blindzone," and that is a term we coined to describe the area behind a vehicle that cannot be seen by the driver. We do not refer to this area as a "blind spot" anymore because not only has that term already been associated with the area a driver cannot see when they are changing lanes, but when the area behind a typical vehicle where you cannot see if there is a child behind it is approximately 8 feet wide and from 8 to 60 feet long, we knew that large of an area could never be referred to as a "spot."

The good news is that we have a commonsense and cost-effective solution. Bipartisan support to address this problem was led by former Senators Clinton and Sununu and Representatives King and Schakowsky, who shepherded in the Cameron Gulbransen Kids Transportation Safety Act. The bill was signed into law by President Bush in 2008, and it gave DOT 3 years to issue a final rule, with the ability to phase in the technology.

However, the bad news is the rear visibility rule has been the subject of unwarranted delays and is the epitome of "Justice Delayed: The Human Cost of Regulatory Paralysis."

Even worse, is that the victims of this tragic delay are almost always 1-year-old children. I am talking 12 months to 23 months. And to further compound this tragedy, which we all would agree that the worst thing that can happen is the death of a child, in 70 percent of these cases the person behind the wheel who kills that child is a parent or a close relative. The people who love them the most are suddenly responsible for killing them.

So here we are today. DOT had a very open and transparent rulemaking process where the auto industry, technology suppliers, consumer health and safety groups, and parents who had lost their child due to a back-over crash submitted thousands of pages of comments. The agency even held a public hearing, but unfortunately DOT has announced five substantial delays in issuing a final rule. Currently we are more than 2 years overdue.

The recent announcement by DOT that the final rule will be delayed until January 2015 is unacceptable, unnecessary, and, most of all, deadly.

I strongly disagree with the testimony of another witness. In the case of the rear visibility standard, when OIRA delays a rule, it does have profound economic and emotional costs to consumers. The delay in this rule has resulted in 1,100 fatalities and over 85,000 injuries, resulting in staggering costs to families and society.

Furthermore, rearview camera systems are now more common, less expensive, and better quality than when the rule started. By

the end of this week, at least 50 children will be backed over and at least 2 of them will die. It is imperative that OMB and DOT issue the rear visibility rule immediately.

Thank you very much.

[The prepared statement of Ms. Fennell appears as a submission for the record.]

Chairman BLUMENTHAL. Thank you very much, Ms. Fennell.

Let me begin with a number of questions to Dr. McLaughlin and Mr. Batkins. Would you agree with Ms. Fennell that the rear visibility rule should be issued sooner than 2015? We can begin with Mr. Batkins if you——

Mr. BATKINS. Sure. We do not have a particular position on the substance of the rearview visibility laws. A 501(c)(3), we do not take positions for or against any particular regulation or piece of legislation. It is my hope that we do have a proper procedure in place and that OIRA finishes the review and the procedures that it has.

Chairman BLUMENTHAL. Dr. McLaughlin, do you have a view on that?

Mr. MCLAUGHLIN. Thank you. So what Ms. Fennell has identified is what I will call a "partial analysis." She has given some data and that should absolutely be considered. The decision to make in any regulatory proceeding is both what are the consequences of taking an action and what are the consequences of inaction. So if you do not do anything, what are the human costs? She has taken a step toward identifying that. If you do something, will it actually reduce those human costs? This is part of the consideration that has to go into the analysis.

If so, then who pays for it? Does it, for example, disadvantage the poor? What are those unintended consequences that the rule will inevitably make? Will people——

Chairman BLUMENTHAL. Well, let me—and I apologize for interrupting you, but I think that we need to look at the process and the amount of time as well as the substance, and quite understandably you are identifying an analytical process that should be undertaken, weighing costs and benefits. The question, though, that is raised by Ms. Fennell's very compelling testimony is: Shouldn't it be done quicker and sooner? What would you say to that question?

Mr. MCLAUGHLIN. It depends on what the cause is for the delay. So if there is—let us call it like it is——

Chairman BLUMENTHAL. And you do not know what the cause for the delay is?

Mr. MCLAUGHLIN. If there are shenanigans going on, if there are political games going on that are causing the delay, then by all means call it that. But if the cause of the delay is allowing the agency or OIRA to improve the analysis to make better choices, to avoid unintended consequences that could also cost human lives, then the delay may be worth it.

Chairman BLUMENTHAL. Ms. Seminario, do you have a view on that issue?

Ms. SEMINARIO. Well, I am somewhat stunned here. Dr. McLaughlin seems to be more concerned about the process than he does about the real outcome. Again, I have been doing regulatory work for a very, very long time. We used to be able to get rules

out. There were decent analyses. The rules were held up in court. There are more and more requirements that have been put in place, largely coming from people who objected to rules, who used more analysis as a way to slow them down.

And so, yes, I do think that delay is a problem, and I think what we should look at is: To what extent are the kind of analyses that are being done adding real value to the protections that are being issued?

I do not see a lot of difference in the safety and health rules that came out in the 1970s—and one of the first ones that came out was 14 rules on carcinogens, 1974, a four-page preamble. The rule was held up in court.

One of the last toxic chemical rules that OSHA came out with, hexavalent chromium. Thirteen years in the making. The only reason it was issued was because a court ordered OSHA to do it, and thousands and thousands of pages of analysis behind a 200-page preamble.

So, no, I do not agree that analysis for the sake of analysis and getting better analysis is really worth it, and I think we have to reexamine if we have not gone too far.

Chairman BLUMENTHAL. I am chagrined to tell you that a roll call vote has just started, so I think the best way to proceed is for us to take a very, very brief recess, just giving us enough time to go down, vote, and come back. I really do apologize to everyone here, but we will be back, and the recess will be very brief. Please do not go away.

Thank you.

[Recess at 2:51 p.m. to 3:17 p.m.]

Chairman BLUMENTHAL. Thank you all. We are going to reconvene, and I believe that we were talking about the passage of time and the possible costs in the passage of time, even when the analysis of cost/benefit is fully justified and has to be and should be undertaken.

Mr. Batkins, in your testimony you looked at the rules issued in 2002, and you noted that there were, I am quoting, "record costs," and the amount that you gave was $29.5 billion. On the other hand, your testimony also states that there were benefits of $100 billion, and that was in a bad year. So the net benefit was $70.5 billion.

Now, I am not sure, you know, what the methodology was that calculated the benefits, but don't those numbers argue for a more expeditious analysis of costs and benefits as well as the sizable net benefits of regulations?

Mr. BATKINS. Well, in terms of methodology, it was just looking at the rules that OIRA itself reviewed in Fiscal Year 2012, the final rules, and I would not categorize it as a good year or a bad year, and it was just our audit of what OIRA went through in terms of costs and benefits and those figures adjusted to today's dollars. And if you do an audit of Fiscal Year 2012, they do show, according to every rule, roughly $29 billion in costs and roughly $100 billion in benefits.

In terms of delay, I do not know how those numbers reflect increased delay. We have talked a lot about delay, but there are, of course, dozens of other anecdotal examples that we can bring out

for rules that do get sped through the process. One example is the notice of benefit and payment parameter rule that was issued—that arrived at OIRA in November 2012 and left OIRA by March 2012. That was the entire process. And in terms of transparency delay, I think we mentioned in our testimony we are always happy if there is more transparency. And one thing that we have seen in the past is a lack of return letters sort of explaining OIRA's decision. There were a lot of return letters during the last administration. We have only seen one this administration. And in terms of why these rules are being held up, I think that is one of the few ways that we could actually tell why a rule has been sitting in OIRA for a period of time.

Chairman BLUMENTHAL. I am going to yield to Ranking Member Hatch for his questions, and then I want to follow up on some of what you just said and some other questions to other witnesses. Thank you.

Senator HATCH. Well, thank you, Mr. Chairman. I am honored to be with you in this hearing today. I am sorry about my voice, but I have a mild case of laryngitis.

Mr. McLaughlin, let me start with you, Dr. McLaughlin. Based on the data that you presented about the volume of federal regulations, especially those that actually impose restrictions, is it fair to say that you challenge the premise of this hearing that there exists regulatory paralysis?

Mr. MCLAUGHLIN. There has been no deviation from a long-term trend of the accumulation of restrictions, of regulations, in the last couple of years. I can give you some specific statistics on that. A couple of ways that you can measure how much regulation is coming out of the Federal Government is you can look at the actual book of laws, the Code of Federal Regulations. Going back to 1975, there were 71,224 pages of regulation in the Code of Federal Regulations. In 2012, there were 174,545 pages. There were 5,244 more pages added between 2011 and 2012. The trend goes back through the Bush administration. It is nothing—if you were to graph this and look at the slope of the line, it is pretty much a constant sloping line.

So, yes, I do not think there is any evidence of paralysis by analysis. Rulemaking is going on as always.

Senator HATCH. Okay. The Labor Department says that women are more likely to work in jobs without a retirement plan, more likely to invest conservatively, more likely to live longer than men. Now, does this mean that when regulatory accumulation suppresses economic growth, it has a disparate impact on women?

It is not an easy question. I understand.

Mr. MCLAUGHLIN. Well, it is certainly the case that any effects on economic growth do have human costs. Human costs of holding back, of inhibiting economic growth are most likely to be felt by those who most can—excuse me, who least can afford to lose some money.

Now, I would perhaps refocus this on low-income households, for example. When you have a regulation that causes prices of goods to increase or inhibits innovation that would allow prices of goods to go down, or maybe even more importantly, would allow some sort of innovation that could save lives to be cheaply implemented

in cars, then the people who are going to most suffer are those who have the least income to purchase goods.

So the example I gave earlier was the inhalers for asthma, for treatment of asthma.

Senator HATCH. Your prepared testimony gave the example about regulations that tripled the cost of asthma inhalers. Could you give an example of a product that could save lives but is prohibited by regulation today?

Mr. MCLAUGHLIN. So the National Highway Traffic Safety Administration, for example, regulates how headlights in cars are designed. Basically you can have low beams, high beams, and nothing in between. Now, this is an example of what is called a design standard. It is very much setting forth how manufacturers can make their cars. But manufacturers have been innovating, and they have found ways to make something in between high and low beams. The reason you switch from high beams to low beams when you are driving a car is to keep from blinding the oncoming driver, if someone is coming down the other side of the road. The tradeoff is you lose some visibility on the sides of the road where there could be a pedestrian walking. And so when you switch to low beams, you may not see the pedestrian. There may be a real human cost there.

There is selective dimming of headlights that has been developed, and they have been sold in Europe and Asia, but they have not been sold in America because regulations have not permitted it. The selective dimming headlight systems will allow the car to dim the bright beam from blinding oncoming drivers, but simultaneously allow the rest of the road to be seen, where pedestrians could be walking.

Now, that is an innovation, that is a new technology that has been developed that could save lives, but that has not yet been able to be sold in America because of the intransigence of the regulatory system.

Senator HATCH. Okay. Mr. Batkins, let me ask you this, maybe the same question I asked Dr. McLaughlin. The data you presented seemed to challenge the premise of this hearing that there is, in fact, regulatory paralysis. Is that a fair statement? And could you elaborate further on just how unprecedented the level of regulatory activity has reached?

Mr. BATKINS. Sure. I think a lot of the regulations we are talking about are sort of what you would think in the traditional sense command and control regulation. But I am also interested in regulations, you know, the figurative red tape that makes it more difficult for citizens to interact with their Government. If you are a veteran going through the benefits and claims process right now and you have to undergo training just to look at the chance of applying for benefits, if you are an immigrant trying to go from your current status to citizenship, that is not an easy process. And, you know, just in the last month we have added 10 million paperwork burden hours.

Now, this is something that—I think none of us are going to install a wet limestone scrubber on a power plant anytime soon, but I think all of us, especially small businesses who are particularly affected, have that direct impact of paperwork. It is one thing that

we know, that we can measure, that is growing, that we do not have to adjust for dollar values over years. And I think it is one example of regulatory accumulation.

I was happy to see today the administration just released a DOT revision that would supposedly cut I think 34 million hours of paperwork, and I will be interested to see the details of that proposal.

Senator HATCH. Let me ask you for yes or no answers on these three questions. What type of trends do you see with regulations? Are they increasing in quality?

Mr. BATKINS. The trends, based on what I have seen from the Mercatus tools, is that they have not been.

Senator HATCH. Are they increasing in quantity?

Mr. BATKINS. In terms of major and economic significance, yes.

Senator HATCH. Are they increasingly burdensome?

Mr. BATKINS. According to OIRA, they are.

Senator HATCH. Okay. Can I ask one more question?

Chairman BLUMENTHAL. Take as much time as——

Senator HATCH. I am going to have to leave.

Chairman BLUMENTHAL. Take as much time.

Senator HATCH. Thank you, Mr. Chairman. You are very gracious. I appreciate it.

I would like your take on the criticism of the Office of Information and Regulatory Affairs. It seems that the critics want to have it both ways. First, they criticize OIRA for following Executive orders on cost/benefit analysis before a regulation is issued. But then they are happy to cite studies showing cost/benefit results after the implementation of a regulation.

With the massive number of regulations and the vast regulatory bureaucracy, if I—you know, I am sure that anyone can find individual examples of regulations that are waiting for OIRA review for a while. But aren't there also rules that do speed through the process?

Mr. BATKINS. There are. The benefit and payment rule was one that I mentioned. CAFE, which was certainly a big rulemaking, I think spent a month at OIRA in the proposed and final stage. And in terms of sort of retrospective analysis, I think that is probably more important or just as important as the ex ante as well. We have heard the retrospective analysis of costs and benefits.

I would like that for more than just a select few rules. I think that is one reason why the legislation in Indiana that passed last year with five no votes throughout both legislative chambers is so important, to review regulations after their effective date. I think that is when you really get a handle on, you know, are we doing it correctly, is the regulation worked as designed. And that is why I think the Indiana law is a good model.

Senator HATCH. What are some of the possible reforms that could streamline regulations and still protect public health and safety?

Mr. BATKINS. Well, in terms of additional analysis, the Administrative Conference of the United States, which is itself sort of a quasi-regulatory body, just recently recommended sort of these cost/benefit analyses through all independent agencies. Now, obviously that is something that independent agencies oppose, but one thing we did last year when we reviewed all the regulations was we sorted them by CFRs, where they are codified in the Code of

Federal Regulations, and Title 17, Commodities and Securities, if you exclude FAA airworthiness directives, was number one in terms of volume. But that is also the title that is probably least analyzed by regulators.

There are some other ideas. I mentioned paperwork. An idea that we have thrown out would be paperwork neutrality for information collection and for overall hours. So essentially that the total paperwork budget, you know, does not increase.

Now, this does not affect regulatory requirements for health or safety or environment, but it does, I think, perhaps maybe provide teeth in the Paperwork Reduction Act analysis. There are individual agencies that have cut millions of hours or consolidated existing paperwork requirements.

Senator HATCH. Well, enacting too many regulations is as destructive as enacting too few, which is an easy statement to make. What type of legislation could we advance to ensure executive agencies create and promulgate effective regulations that close legislative gaps without oppressing American businesses?

Mr. BATKINS. Well, one idea which was actually recently put forth by the Progressive Policy Institute would have been—would be a BRAC-like commission to review regulations. Again, this is a retrospective. I believe there is actually a bill in the Senate on sort of this BRAC-like commission. It would be bipartisan. Congress would vote up or down. The PPI paper even recommended through the first phase of this round perhaps exempting environmental rules to make the process easier. I do not know necessarily that anything would be easier in terms of regulatory reform. But that is one additional idea that is out there.

Senator HATCH. Well, should regulations have an expiration date?

Mr. BATKINS. On the paperwork side, they to some extent do. They have to be reviewed every 3 years by OMB. There are a lot of paperwork collections that expire and the agency does not have formal approval, and OIRA will note all the violations of the Paperwork Reduction Act. But I think maybe not necessarily an expiration date. It depends on the regulation obviously. But definitely I think a period of review after the regulation has been implemented.

Senator HATCH. Thank you.

Ms. Seminario, we have known each other a long time. I have a lot of respect for you and what you are trying to do. I worry sometimes that our union movement goes too far and it costs a lot of jobs, as someone who worked 10 years in the building construction trade unions in Pittsburgh and held a union card, and proud of it. But I just want you to know that I have great respect for what you are trying to do.

Ms. Fennell, you and I know each other from a long time ago, trying to help some of the children and so forth.

And, Professor, I was very interested in your testimony here today.

I want to compliment our Chairman for holding this hearing. It is an important hearing. I would like you, each one of you, to tell us how we can do a better job here. What can we do to protect the American people without costing an arm and a leg so that they do

not have jobs? I mean, that is, after all, I think one of the things that we are really worried about and really trying to do.

I am sorry I did not ask my usual devastating questions to you women here, but—because I wanted to get even. But—that was supposed to be humorous. I did not hear anybody laugh at all.

[Laughter.]

Senator HATCH. But I respect what you are trying to do. I respect how important it is to work in the best interests of our workers in this country and people in general, just consumers in general. But we have got to find a way that regulations mean something, that they are enacted quickly, that they are dis-enacted when they do not work, and that the costs, the excessive costs that result from overregulatory activities we can dent and maybe save the taxpayers a lot of money.

Having said that, I want to thank you, Mr. Chairman, for allowing me this extra time and for holding this, what I consider to be a very important hearing. And we will look more thoroughly into the documents that you have given us and have tried to help us with.

Thank you all for being here.

Chairman BLUMENTHAL. Thank you, Senator Hatch.

Senator HATCH. Excuse me. I am going to have to go.

Chairman BLUMENTHAL. I understand you have other Committee commitments and obligations and you will not be able to stay, so I really appreciate your giving us this much time and the thoughtful questions that you asked. And if you have no objection, I am going to continue with my questions.

Senator HATCH. Of course not. I am honored to be with you. Thanks so much.

Chairman BLUMENTHAL. Thank you very much to Senator Hatch.

Let me go back to I think the point that you were making, Mr. Batkins, which I think is an important one, as to OIRA, which is the Office of Information and Regulatory Affairs. Your point I think was about the problems with potential lack of transparency in the letters that OIRA may send to agencies in returning regulations for revision. Maybe you could expand on that point.

Mr. BATKINS. Sure. To date, we have only seen one return letter, sort of a one-page letter from then-OIRA Administrator Cass Sunstein, explaining the reasons for return of the ozone letter. Obviously that was very contentious. I think it was right before a Labor Day recess. But if you look back at the historical OIRA return letters, I think there are several dozen during the Bush administration, and occasionally a rule gets delayed far beyond its 90-day period and we do not know why. Something that we did look at in terms of trends of how rules have been at OIRA, we looked last October for rules that had been at OIRA longer than 90 days, and I think it was something like 84 percent, and people attributed that to political reasons, and there is no evidence to—direct evidence, at least that I can see, that backs that up. Today that figure is down to around 55 percent that I think have been there longer than 90 days.

OIRA does provide a lot of transparency for meeting records. If you go to OIRA and you meet with the Administrator, of course, that will be recorded, as well as any documents that you submit.

Chairman BLUMENTHAL. I wonder if any of the other witnesses have comments on the transparency of this process.

Ms. SEMINARIO. I would just like to make a comment. The process really, in my view, is not transparent. As Mr. Batkins says, there is a log of meetings of who showed up and if you leave a document, but there is no record of what was discussed. And if you compare that to the rulemaking process that takes place at the agencies under the Administrative Procedures Act, there has to be a record. Everything has to be on the record. And there is to be no ex parte communication.

And so it is a great concern that OIRA essentially provides a forum for those who wish and those who are able, and it is largely industry and Washington representatives. They have the means, they have the ability to go in and to make their case.

And so I think there are some real problems, and we also do not see between the agencies and OIRA a clear reason or explanation of why the rules are changed. That is supposed to be part of the public record. It is routinely not made part of the public record. So I would disagree with Mr. Batkins that the OIRA process is transparent at all.

Chairman BLUMENTHAL. Professor?

Ms. STEINZOR. I would like to return to the rearview camera issue, because I think it is a very good example. First of all, NHTSA asked for the rule to come back, and that was after it had been at OIRA for a very extended period of time, quite beyond the very strong limits that were set in the Executive Order. As our testimony has indicated, that happens all the time. So they asked for it to come back, unclear what the reason is.

As it turns out—and no promise on when it will escape again—very likely that OIRA told them to ask for it to go back. Half the cars in the country have cameras like this. There was a report in the *New York Times* that the reason that the auto industry was opposing the rule was because it had become accustomed to bundling the rearview camera for these half of the cars that are sold in the country with items like satellite radio, which become then a package that is sold to consumers—this certainly does not help low-income people—and that that was the reason, quite apart from the cost for the camera itself, because once you have a screen in the car, which is used for GPS, then the camera is a minor cost.

So when you probe into these things—and I have spent a long time sort of trying to scratch to the bottom of it; it is sort of like a treasure hunt—you often find that the rationale for opposing a regulation that would have such important benefits is an economic concern of the industry that does not have very much to do with the cost of the camera, does not have much to do with the lives that are saved, but is instead a strategic decision about profit. And that is appropriate for corporations. Corporations should be very concerned about profit. But we need a Government to make sure that they do the right thing; otherwise, we end up with cut-throat competition that really hurts consumers and workers and members of the public.

I also wanted to say that, in terms of what Mr. Batkins was saying, I agree with him about paperwork for the average citizen. I could not agree more. I think that, you know, I am in big trouble

as an advocate for healthy and safety and environmental regulations because when people hear regulation, they think about the paperwork they have to do. And as, you know, the mother and a family, the time I spend filling out forms just even for health insurance, it goes on forever. So I agree with him.

But there is a difference between paperwork for the average person and what is happening to veterans when they try to get their benefits, big difference between that and the kind of health and safety and environmental regulations that Ms. Seminario and I were talking about, and Ms. Fennell.

Chairman BLUMENTHAL. Ms. Fennell.

Ms. FENNELL. Could I add a little bit to that testimony?

Chairman BLUMENTHAL. Absolutely.

Ms. FENNELL. You are absolutely correct. Right now, if you are going to have a rearview camera on your vehicle, it is usually a high-end vehicle; or the only way you are going to get it is if you go to the top of the trimlines and you are going to get leather seats and chilled and heated cup holders and all of these wonderful, unnecessary things, which are really creature comforts. And I know we heard one of the witnesses say about disproportionately affecting the poor. Well, safety should not be an option. And through the regulatory process it would require that all vehicles have a rearview camera. And if I am fortunate enough to have a rearview camera in my vehicle but I go to the grocery store and the child gets away from me and is backed over and killed by someone who does not have a camera.

So it really does even the playing ground. When people talk about losing jobs, it is kind of interesting because so many of these elements are made in America. There is a wonderful company up in Michigan that is doing very well based on the introduction of these type of technologies. But I do not care if it is cameras. I mean, if you can put a mirror on a vehicle and see everything that is behind you, that is fine. What we are really trying to break loose here is the fact that it is unconscionable to put somebody behind the wheel of a 3,000-pound lethal weapon and they do not know what is behind them when they are backing up.

Everybody needs that vision and it should not be available just to people of means. Safety should not be optional.

Chairman BLUMENTHAL. Ms. Fennell, have you been given a reason or do you know of the reason that has been given to others as to why this rule has been so long delayed?

Ms. FENNELL. Well, at the beginning—because, you know, there have been five delays. At the beginning, you know, I could kind of go along with this because, you know, adding rearview cameras to vehicles will forever change the way that we drive. And just like seat belts and air bags, you know, there are some changes that need to be made. And, you know, I have attended all the meetings, and I went to the site in Ohio when they pulled together all the manufacturers and, for instance, one of the things that I had not thought about is, you know, they dictate what you should be able to see, and Ford Motor Company had a great invention where, when you are trying to hook a trailer up to your vehicle, you could zoom in with your camera and make it a very easy task. Well, when you zoom in, you would then be out of compliance.

So there are some of those complexities that needed to be looked at and taken care of. But at the same time, we hear a situation where, when this rule came out that the industry said, well, we thought this was just going to be on SUVs and pick-up trucks and minivans, you know, only on the larger vehicles, again, very disingenuous because before, you know, a month before the bill was going to be passed, they supported it. They said they were for it. And now, with all this time and all these different things that have changed, they now are against it. And, you know, they do not want to put a camera on certain vehicles or their low-end vehicles.

But it does not make sense because it really does make our playing field even. No one is going to be disproportionately affected by this.

I have to give a great call-out for Honda. As much as 97 percent of their fleet have rearview cameras. And I do not know if you have seen some of the advertising different car companies are using. I mean, they know people want this. And we do not want it held captive as the highest trim level. We do want it to be available for everyone, and it does not affect one manufacturer versus the other, except for the ones that are smart enough to realize that consumers want this and they are willing to make a brand change to get what they want. I mean, it is standard equipment on a Honda Civic that costs $17,000.

Chairman BLUMENTHAL. Does this viewing device also enable drivers to avoid hitting inanimate objects so that someone who may be not as cognizant of the road as otherwise would have a better view of what they may be backing into?

Ms. FENNELL. I am so glad you brought that up, Senator. Thank you. Part of the analysis that is totally missing from this look at the need for being able to see where you are going when you are backing up is the fact that can you imagine how much money you are going to save because you do not have to keep repairing your bumper that ran into the pole, into the fence, into your garage? This gives you visibility. None of that is figured in there, and if people have had bumpers repaired lately, it is always in excess of $1,000.

So there are all these other benefits, and we have a young man that we work with that at 18 months he was backed over and had a serious spinal injury and has lived his entire life in a wheelchair. Those are some serious costs to our country and to children who just cannot be seen because there is no standard.

Chairman BLUMENTHAL. Very well said.

I guess I should make the point just for the record that the "you" used in your comment just now was not addressed to the Chair or a comment on his driving ability.

[Laughter.]

Chairman BLUMENTHAL. But a collective "you," although if you ask my wife and children, it could be well addressed to the Chair.

Ms. FENNELL. Well, that is probably why you asked that very critical question. But I do invite anyone—as part of my testimony, I attached the Consumer Reports results because what they would do is for every vehicle that went through their test site, they would test what the blindzone is for a 5-foot–4 and a 5-foot–8 driver. Nobody thinks that your height has anything to do with being able

to see behind your vehicle. But it does. You know, if you have long legs or a long torso, all of that goes into it.

But, more importantly, take a look at where our vehicles were, you know, 20, 30 years ago, and look at them today. They are much higher off the ground. They have windows in the back that are so small you can hardly see. They have a third row of seats that have headrests that are this big. They kind of slope down. There are spoilers. There is a tire on the back. All of those things are happening because there is no standard. You can just do whatever you want.

And, I mean, I think it is cool to have nice-looking cars, but I never would want to cause the death of a child for a design and style issue.

Chairman BLUMENTHAL. I appreciate those points, and I am going to turn in just one moment to Senator Whitehouse, who thankfully has joined us. I appreciate his being here. But just one question for Dr. McLaughlin. You know, you have heard described—and maybe you knew about it before—the practice of bundling or tying the back-view device to other optional items on the car, such as radio service. As an economist, I am just wondering—and you have also, I am sure, been aware of research that shows there are a lot of costs in bumper repairs, which are quantifiable, not to mention worst repairs that could result from backing into inanimate objects, plus the unquantifiable and tragic costs of death. I am just wondering what you think about the practice of tying this kind of device with potentially such great measurable and important benefits to radios, perhaps other optional items that have no discernable economic benefits.

Mr. MCLAUGHLIN. Chairman, you are right that bundling is studied by economists, and it is indeed a profit-maximizing technique. However, I would—just listening to this, I do not profess to be an expert on rearview cameras in cars. However, just listening to what was discussed now, if the problem is bundling, then perhaps one regulatory solution that could be addressed is bundling. Is it necessarily the case that it has to be a rule that says all cars must have cameras? I do not know. I am saying that the agency can take a look at multiple options, like they should do in a regulatory analysis. One option they could consider is maybe we should stop the practice of bundling. Another option is maybe there should be cameras on every car.

And both of those choices—and they should consider other options as well—would indeed have costs. They would have tradeoffs. They would have benefits. And those should all be assessed.

And I would make the point that one of those costs would be to raise the cost of cars. If you require all cars to have cameras, they will become more expensive. That does disproportionately affect people who have lower income. An increase in price of $200 or $1,000, whatever the number may be, is a higher percentage increase for someone who has a lower income relative to his income than for someone who has a higher income.

Chairman BLUMENTHAL. If he wishes, I am happy to call on my colleague and friend from Rhode Island, Senator Whitehouse.

Senator WHITEHOUSE. Delighted to be called on, Mr. Chairman. Thank you. Thank you very much for holding this hearing. I think

it is very valuable and important, and I know that as the Attorney General of Connecticut for a very, very long time, you were deeply, deeply involved in consumer issues, and so it comes as no surprise that this should be a passion of yours in the Senate as well. But I am grateful to you. I think it is an important issue and an important hearing, and I thank all of the witnesses for being here.

I would like to add something to the record of the hearing, if I may, which is a very thoughtful and interesting article by Lisa Heinzerling called, "Who will run the EPA?" And, without objection, if I——

Chairman BLUMENTHAL. Without objection.

Senator WHITEHOUSE. Thank you.

[The article appears as a submission for the record.]

Senator WHITEHOUSE. It discusses the EPA-based regulations that made their way over to the Office of Management and Budget and then sat there. We have a list here for this hearing—the article kind of covers the EPA stuff. I just have a list here of the Department of Energy regulations that are under OMB review. There are 10 of them, and 8 have been there more than the 90 days that the Executive Order prescribes: energy efficiency and sustainability design the District for new federal buildings, solar hot water requirements, water efficiencies, and green building ratings, 706 days; fossil fuel energy consumption reduction for new construction and major renovations to federal buildings, 693 days; energy conservation standards for walk-in coolers and walk-in freezers, 670 days; and so on, 645 days, 581 days, 523 days, 523 days, 523 days. There is a little packet that has been there 523 days.

Well, 523 days is more than a year more than the 90 days that by its own terms the administration is supposed to follow. I am pleased that Ms. Burwell has been confirmed into that position. She and OIRA Director Schlanksy have both energetically addressed themselves to this problem, and I think it is going to improve. We are meeting with them regularly to make sure that benchmarks are met and that they are able to clear this backlog. But I think this is a really important thing to get done.

To Dr. McLaughlin's point, these are regulations that have already been through the vetting of public scrutiny, of the Administrative Procedures Act, and of the tests required for net benefit, net economic benefit. So when they are just being stalled, it is pretty clear that something that would be beneficial to the public is being stalled, and the public is being deprived of those protections.

So I wanted to make one point and then ask a technical question. The point that I want to make is that it would not surprise me if these regulatory delays related to a larger problem that we virtually never discuss here in Congress of regulatory capture, of the undue influence of regulated industries over their regulators. This is a widely, widely discussed and commented on phenomenon. Woodrow Wilson wrote about it. It is in Nobel Prize-winning authors' economic literature. It is throughout the treatises on administrative law. It is in the editorial pages of the *Wall Street Journal* right around now. In recent years it has really immensely solid academic provenance, both in the economic and in the legal fields. And out there in real life, guess what? We saw an SEC that coughed up for Wall Street humongous leverage standards that led

very significantly to the Great Recession that we just had. We saw the Mine Safety Administration go lax on mines with miners killed in explosions and accidents. And we saw appalling conduct out of the Minerals Management Service in the run-up to the gulf explosion and oil spill.

And so, you know, you have got the academic theory that goes back, gosh, probably about a hundred years now in several disciplines. And then you have got real-life practice of this problem, of this principle. And when I held a hearing on it sometime ago, I asked my staff, let us go back and look at all the other hearings that have been held on this issue so we have some historical background. There had never been one. So I think that it is important for us to be looking at this in the context of regulatory capture as well.

Ms. Seminario, I saw you nodding your head, so let me ask if there is something you would like to add, and then I will quickly go to my question.

Ms. SEMINARIO. What I would like to add is just to relate to you an experience I had about a year ago on Workers' Memorial Day in 2012. There was a Senate hearing on the delay in OSHA rules, and as part of that hearing, there were numbers of workers, family members who had lost loved ones from explosions, from combustible dust, victims with silicosis who came to Washington. And we not only came to the Senate, we also went to OMB. We had a meeting with Cass Sunstein. And OMB kept asking us: "What is this meeting about? What is this meeting about?" And we said, "The meeting is about workers and family members who would like to come and talk to you about the importance of your job in clearing these rules." And we walked into the room, and he was very polite. And he said, "This is a very unusual meeting. I have never had a meeting like this. We do not hear from people like you. The only people that we hear from are the industry. They are here all the time."

And as I said, it was a very polite meeting. But the silica rule, which was part of that discussion, it is still there at OMB. The combustible dust rule is not going anywhere. And after that meeting there was a press report a few months later about Mr. Sunstein and how there had been a letter that came in on silica from the construction industry. And he had sent the letter through an e-mail to the White House Chief of Staff's office and said, "Maybe this is something you should look at." They were complaining about the costs of the rule. Was there any conveying of the workers' concern, the family member, the fact that these rules were needed? No.

And so regulatory capture is a huge problem, and it is not just in the agencies. It is at the White House where these meetings go on behind closed doors.

Senator WHITEHOUSE. There is very little transparency in the OMB process, unfortunately.

I had a technical question, if I may continue a little bit further, about Dr. McLaughlin's testimony.

Chairman BLUMENTHAL. Sure, absolutely.

Senator WHITEHOUSE. You have graphs in your testimony that show the increasing number and burden of regulations. I am no great fan of unnecessary and excessive or obsolete regulation. I do

not think anybody is. But I just wonder about the methodology of that a little bit. I have been a regulator myself, and I have been a lawyer engaged in the regulatory process myself. And what can happen is that a regulation gets developed, and it goes on the books. And then it comes time to update or amend it, and so then a new regulation gets adopted that is the amendment to the first one, and it updates it. And then time goes by or flaws are revealed, and another regulation gets put in place of that.

It looks to me by your graph that you count that as three separate regulations, but, in fact, it is one regulation that has been added to by another that displaced the first one. And so my experience has been that a lot of regulations that are on the books that appear to be obsolete either are in desuetude, simply not enforced any longer and, therefore, meaningless to no one, not creating an active burden, or they have been overruled by subsequent legislation or replaced by subsequent regulation so that they are no longer a practical, immediate problem in the day-to-day lives of the regulated entities.

Could you tell me how in your graph and in your methodology you accounted for those two types of regulations—ones that are still on the books but simply are not enforced because they are in a state of desuetude, and, second, those that are still on the books nominally because you do not formally repeal and chuck out a regulation, you update it with a new one, but what is enforced is the updated regulation not the old one, so it might as well be dead sitting there on the books? Do you have a process for counting those out as you do the addition to the sum?

Mr. MCLAUGHLIN. So I have also been a regulator, worked for DOT, and your points are spot on. That is indeed how regulations are formed. Requirements are piled on top of requirements on top of requirements. It is not necessarily the case that an old one is in force or is as burdensome as a new one.

And, by the way, I would like to make the point, Senator, that what I am measuring is regulations. It is not necessarily measuring burden.

Senator WHITEHOUSE. Okay.

Mr. MCLAUGHLIN. I am counting restrictions, I am counting pages. Those could lead to benefits, those could lead to costs. It is quantifying.

Senator WHITEHOUSE. So hypothetically, at least, you could have a situation in which a burdensome and obsolete regulation was replaced by a less burdensome, sensible regulation and although in a burden measurement context you would show that that went down, the graph that you have shown would actually—it would look like it was two because it would be in addition?

Mr. MCLAUGHLIN. So my graph was showing the accumulation of restrictions. That has been shown to be an important measure in economic analysis, and that is the point. I do not pretend it is a perfect measure by any means. But it is a useful measure. It does give us an idea of how many regulations we have piled on top of regulations on top of regulations, and thrown into a context, for example, of——

Senator WHITEHOUSE. But the point that I am making is that in some cases, when you say regulation piled on regulation piled on

regulation piled on regulation piled on regulation, that implies that they are cumulative of one another rather than replacing of one another.

Mr. MCLAUGHLIN. Yes, sir. But how do you know when one is not in effect or is not?

Senator WHITEHOUSE. That is the difficulty.

Mr. MCLAUGHLIN. And how does a business know?

Senator WHITEHOUSE. That is the weakness, I think, in a pure mathematical or accumulative process. And I do not think you are wrong for putting that information out there, because I think having to look into it and make that decision regulation by regulation becomes so complex and so riddled with judgment calls that it is very hard to tell. But I did think that the record of the hearing should reflect that when you are adding a new regulation, you are not necessarily adding a new burden on an industry. You actually could, in fact, be reducing a burden on an industry, and that possibility is not reflected or measured in your accumulative graph, correct?

Mr. MCLAUGHLIN. I do not disagree with you, sir. The methodology could be improved. I am working on improving it. I do not pretend that it is perfect.

Senator WHITEHOUSE. It ain't easy, and I am not faulting you for it. I think it is really a challenge.

Mr. MCLAUGHLIN. However, it has been useful—well, the page count, the other graph that was in there, has been used in a publication that just came out in the *Journal of Economic Growth*, a peer-reviewed publication, a good journal, that did show that this measure, even though it is not perfect, page counts is even worse than counting restrictions, arguably. It does work well for showing how that does affect economic growth.

Senator WHITEHOUSE. Chairman, you have been very generous with the time. I appreciate it. And thank you again for holding this hearing. This is such an important topic, and you are such an ardent consumer advocate. It is good to see you in action in this way.

Chairman BLUMENTHAL. Thank you very much, Senator Whitehouse, and thank you for those very, very salient and important points. And I might add that my hope is that we can explore in a separate hearing some of the environmental regulations that you quite rightly well before this hearing called attention to and Ms. Seminario had mentioned as well, because what I hope to do is explore subject by subject, topic area by topic area, the ways in which environmental workplace safety, all of these regulations, when they are delayed have consequences and costs going forward.

And I might just mention a number of organizations have expressed interest in this general topic, and without objection, I am going to put their statements in the record along with a very helpful and supportive statement from Chairman Leahy on this issue.

[The information referred to appears as a submission for the record.]

Chairman BLUMENTHAL. You know, I just really want to close this hearing by thanking our witnesses and saying that there is a lot of common ground here. In fact, I am tempted to say more in common than in conflict, because Mr. Batkins I think, for example, mentioned the idea of retroactive views of regulation. In the med-

ical device area, I helped to adopt an amendment, lead an effort to adopt an amendment that essentially expedites the consideration by the FDA of new medical devices, but at the same time imposes stronger retroactive or retrospective analysis of the potential malfunctions or other problems with those devices. So that, in effect, the rulemaking or review process is expedited, but there is a stronger lookback provision in the law; whereas, before now, almost no lookback provision was applied and longer periods of time were taken to approve the device.

So not to say that that model is necessarily applicable here, but, for example, if it were applied to the rearview camera device, if there were objections, maybe we could require implementation of that device, and then folks could come along and criticize how it should be changed or how different rules might be applicable, but at least we would have more cars with more of these devices. We would have more OSHA rules that protected people against workplace safety issues, including the kind of tragedy that occurred at L'Ambiance.

So I am going to bring this hearing to a close. I think it has been very important, and I really want to thank all of those here for their insights and all of the organizations that have taken an interest in this area. I am going to encourage and ask every one of the witnesses to give me—because you have made reference to them—a list of other rules or standards that were delayed too long or—and I want to be fair—approved too quickly. And Mr. Batkins mentioned a few; Dr. McLaughlin may have some in mind, on both sides of the ledger, so to speak, because I can promise you, if you give us your suggestions, we will look into them, because, as I mentioned, we are going to be having other hearings.

I want to invite everyone who is here to return to them, including the students who have accompanied Professor Steinzor. I hope you get credit for having attended. Not even a Senator can compel credit at a university. But thank you—or especially a Senator cannot compel credit.

[Laughter.]

Chairman BLUMENTHAL. But thank you all for being here, and this hearing is closed. The record will be kept open for a week. Thank you.

[Whereupon, at 4:08 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the
Senate Committee on the Judiciary
Subcommittee on Oversight, Federal Rights, and Agency Action

On

"Justice Delayed: The Human Cost of Regulatory Paralysis"

Thursday, August 1, 2013
Dirksen Senate Office Building, Room 226
2:00 p.m.

Rena Steinzor
President, Center for Progressive Reform
Professor, University of Maryland School of Law
Baltimore, MD

Sam Batkins
Director, Regulatory Policy
American Action Forum
Washington, DC

Peg Seminario
Director, Safety and Health
AFL-CIO
Washington, DC

Dr. Patrick McLaughlin
Senior Research Fellow
Mercatus Center at George Mason University
Arlington, VA

Janette Fennell
President and Founder
KidsAndCars.org
Bala Cynwyd, PA

PREPARED STATEMENT OF HON. PATRICK LEAHY

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Subcommittee Hearing, "Justice Delayed: The Human Cost of Regulatory Paralysis"
August 1, 2013

Today's hearing focuses on the problems that can result from delays in agency decision-making. Too often, regulations that would benefit consumers and protect investors are being delayed before implementation, postponing the benefits of those rules and creating uncertainty for the consumers and businesses that will be affected by them. I thank Senator Blumenthal for addressing this important issue at the first hearing of the Subcommittee on Oversight, Federal Rights, and Agency Action.

Regulations play an important role in protecting American workers and consumers. We all benefit from products that have been tested to meet strong health and safety standards. Workplace safety rules ensure that American workers are not put in danger simply by showing up for work. Regulations protect our air and water supply from contamination, protect investors from deceptive financial products, and help ensure that the toys we give our children are safe. Effective regulation can help level the playing field and guarantee a minimum level of protection that benefits us all.

In recent years, many have talked about the burdens created by federal regulations. I agree that we must seek a balance so that regulations are fair and tailored to achieve the public protections and benefits for which they are designed. No one wants to see businesses needlessly overburdened or caught between duplicative or confusing rules. But as we discuss effective rulemaking, we should not lose sight of the important policy and consumer interests that regulations can help protect.

We must also ensure that the process through which rules are promulgated remains efficient and enables agencies to fulfill their mandates. When an agency is delayed for years in implementing a statute passed by Congress because of political and procedural hurdles, it undermines Congressional intent and prevents the agency from serving the public interest for which it was created. Unfortunately, the delays in rulemaking have parallels in the Senate's recent disputes over confirming executive nominees, such as the needless holdup that forced the Consumer Financial Protection Bureau to work for over two years without a confirmed director. These delays come at the expense of American workers and consumers.

I thank Senator Blumenthal for highlighting this important issue today. I welcome the witnesses and look forward to their testimony.

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PREPARED STATEMENT OF RENA STEINZOR

TESTIMONY OF

Rena Steinzor
Professor, University of Maryland Carey School of Law
and
President, Center for Progressive Reform (www.progressivereform.org)

before the

Committee on the Judiciary
Subcommittee on Oversight, Federal Rights, and Agency Action
U.S. Senate

Hearing on
Justice Delayed: The Human Cost of Regulatory Paralysis

August 1, 2013

Mr. Chairman, ranking member Hatch, and members of the subcommittee, I appreciate the opportunity to testify today on how regulations—particularly those issued by the Environmental Protection Agency (EPA)—have saved many lives and how the public's health would be better protected if agencies like the EPA were not systematically and relentlessly frustrated in their efforts to fulfill the statutory missions assigned by Congress.

The subcommittee deserves tremendous credit for airing the truth about the public health regulations that agencies are writing as directed by Congress. The costs of delay are as real as they should be unnecessary, given the clear mandates of the law. Unfortunately, the overwhelming clout of Fortune 100 companies and their relentless, self-serving effort to ignore the great benefits provided by these essential protections has dominated the airwaves.

One does not need to look far to see how essential regulations are. Just ask anyone whose life was saved by a seat belt, whose children escaped brain damage because the EPA took lead out of gas, who turns on the faucet knowing the water will be clean, who takes drugs for a chronic illness confident the medicine will make them better, who avoided having their hand mangled in machinery on the job because an emergency switch was there to cut off the motor, who has taken their kids on a trip to a heritage national park to see a bald eagle that was saved from the brink of extinction—the list goes on and on.

The EPA's regulations are among the most beneficial safeguards the U.S. regulatory system has ever produced. For example, a 2011 EPA analysis assessing Clean Air Act

regulations found that in 2010 these rules saved 164,300 adult lives and prevented 13 million days of work loss and 3.2 million days of school loss due to pollution-related illnesses such as asthma. By 2020, **if the rules are issued promptly and Congress resists shrill demands that it derail them yet again**, the annual benefits of these rules will include 237,000 adult lives saved as well as the prevention of 17 million work loss days and 5.4 million school loss days.[1] Even the most conservative practitioners of cost-benefit analysis, including John Graham, President Bush's regulatory czar, acknowledge what an amazing bang for the buck these regulations deliver in relationship to the costs they impose.

Conversely, because Clean Air Act regulations have been so long delayed—after all, Congress passed the Clean Air Act Amendments in 1990 and we sit here 23 years later—thousands of additional lives have been lost, hundreds of thousands of people have had heart attacks and visited the hospital because of respiratory illness, and people have lost millions of days off work and out of school.

Instead of acknowledging that they have reached the end of the line on delaying tactics that are within the law, the owners and operators of coal-fired power plants, chemical production facilities, oil companies, and motor vehicle manufacturers have shifted focus to the fraught world of polarized politics that you know only too well. These efforts have turned what should be an expert-driven, science-based process for formulating public policy into a blood sport, with the party able to spend the most money becoming the most likely to win. Nothing less than the future integrity of the administrative process is at stake.

In fact, several of my students are in the audience today, and I am pained to tell you that when they study health, safety, and environmental regulation, they are learning more about scofflaw than law. They see that when Congress votes on a piece of legislation by overwhelming margins—the Senate approved the 1990 Clean Air Act amendments by a margin of 89 to 10—everything you write down as an apparently ironclad mandate is far from certain to become reality. They see that instead of trying to muster enough votes to repeal a law, regulated industries have learned to go underground and sabotage it, in the process doing irreversible damage to the credibility not just of the EPA, but of the Senate and the House.

Industry lobbyists characterize the Clean Air Act rules that have finally reached the end of the pipeline as a "train wreck" dreamed up by Lisa Jackson, EPA administrator in President Obama's first term. But Ms. Jackson did not take a trip to the basement of what was then known as the Ariel Rios building where the agency is housed and get drunk on her own whiskey, writing down her best fantasies for torturing industry. Rather, she did her best—at long last—to satisfy congressional mandates instructing her agency to impose more stringent controls on power plants, automobile fuel, boilers, etc. Fighting through the considerable resistance confronting her at the White House, resisting last-minute threats by industries that had successfully battled against this day of reckoning for two decades, Ms. Jackson tried to do what Congress instructed her, in no uncertain terms, to do.

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[1] *See* ENVTL. PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020 (Mar. 2011), *available at* http://www.epa.gov/oar/sect812/feb11/fullreport.pdf.

The truth is that these rules, and the civil servants who write them, do not sweep industry's hard-earned money into a pile and set it on fire for no good reason. The regulations impose costs, but they also deliver tremendous benefits. Ignoring those benefits has become standard practice in the House of Representatives, and we are delighted to see the Senate correct these distortions. Just like the controls on smoking you have championed throughout your career in Congress, Senator Hatch, the chemical and manufacturing sectors have fought these important rules with a disinformation strategy that should sound quite familiar: disputing the danger of air emissions of smog and toxic chemicals and distorting the content of the rules the EPA has proposed. Nothing less than the health of millions of people is at stake. This subcommittee, with its jurisdiction over the efficient and effective implementation of the law, is well positioned to investigate this record and help get the administrative process back on track.

I am a law professor at the University of Maryland Francis King Carey School of Law and the President of the Center for Progressive Reform (CPR) (http://www.progressivereform.org/). Founded in 2002, CPR is a network of sixty scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. We have a small professional staff funded by foundations. I joined academia mid-career, after working for the Federal Trade Commission for seven years and the House Energy and Commerce Committee for five years. For seven years, I served as the lawyer for small, publicly-owned electric systems. My work on environmental regulation includes four books, and over thirty articles (as author or co-author). My most recent book, published by the University of Chicago Press, is *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment*, co-authored with Professor Sidney Shapiro of Wake Forest University's School of Law, which comprehensively analyzes the state of the regulatory system that protects public health, worker and consumer safety, and natural resources, and concludes that these agencies are under-funded, lack adequate legal authority, and consistently are undermined by political pressure motivated by special interests in the private sector. I have served as consultant to the EPA and testified before Congress many times.

My testimony today makes three points:

- ***Regulations have benefited our country greatly, while the persistent delay of needed safeguards has produced great harm. These costs of delay represent real harms to real people—harms that are by definition preventable.***
- ***Agencies' efforts to implement and enforce public safeguards have attracted a fierce backlash from corporate interests that would prefer to continue shifting the harms associated with their activities onto the public at large.***
- ***Agencies are not carrying out their statutory missions of protecting people and the environment in a timely and effective manner, which should be of great concern to Congress. I encourage this committee to investigate the various causes of this regulatory dysfunction, including political interference in agency rulemaking, "bureaucracy bashing," inadequate resources, and outdated legal authority.***

The Benefits of Regulation, and the Costs of Regulatory Delay

Even when measured against the rubric of cost-benefit analysis—the inherently anti-regulatory yardstick espoused by corporate interests and small government ideologues—the EPA's regulations are revealed to be huge winners for society. The 2011 report on the EPA's Clean Air Act regulations concluded that these safeguards would produce benefits worth $2 trillion annually by 2020, dwarfing the $65 billion in compliance costs.[2] Similarly, a recent report by the Economic Policy Institute (EPI) evaluated the total impact of major EPA rules developed during the Obama Administration. The report derived its results by simply aggregating the cost-benefit analyses that the EPA has prepared for these rules. It found that the major EPA rules issued during the first two years of the Obama Administration produced total annualized benefits of between $44 billion and $148 billion, as compared to total annualized costs of between just $6.7 billion and $12.5 billion. The EPI report also found that four of the EPA's then-pending proposed major rules generated total annualized benefits of between $173 billion and $457 billion, as compared to total annualized costs of between just $14 billion and $15 billion.[3]

Other specific examples of the benefits that EPA regulations have produced include the following:

- EPA regulation of the discharge of pollution into water bodies nearly doubled the number of waters meeting statutory water quality goals from around 30 to 40 percent in 1972 (when the modern Clean Water Act was first enacted) to around 60 to 70 percent in 2007.[4]
- EPA regulations protecting wetlands reduced the annual average rate of acres of wetlands destroyed from 550,000 acres per year (during the period from the mid-1950s to the mid-1970s) to 58,500 acres per year (during the period from 1986 to 1997), a nearly 90-percent reduction.[5]
- Working together, the EPA and the state of California have reduced the number of Stage 1 Smog Alert days in Southern California from 121 days in 1977 to zero days since 1997.[6]
- EPA regulations phasing out lead in gasoline helped reduce the average blood lead level in U.S. children aged 1 to 5 from 14.9 micrograms of lead per deciliter of blood (μg/dL) during the years 1976 to 1980 to 2.7 μg/dL during the years

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[2] *Id.*

[3] Isaac Shapiro, *Tallying Up the Impact of New EPA Rules: Combined Costs of Obama EPA Rules Represent a Sliver of the Economy and are Far Outweighed by Cumulative Benefits* (Econ. Pol'y Inst., Briefing Paper No. 311, 2011), *available at* http://w3.epi-data.org/temp2011/BriefingPaper311.pdf.

[4] G. Tracy Mehan, *The Clean Water Act: An Effective Means To Achieve a Limited End*, WATER ENVIRONMENT & TECHNOLOGY, Oct. 2007, *available at* http://www.wef.org/publications/page_wet.aspx?id=4692&page=ca&section=CWA%2035th%20Anniversary.

[5] William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 584-85 (2004).

[6] South Coast Air Quality Management District, State of California, About South Coast AQMD: Progress So Far, http://www.aqmd.gov/aqmd/index.html#progress (last visited June 14, 2011); Air Res. Bd., California Envtl. Protection Agency, Fact Sheet: Reducing Emissions from California Vehicles, *available at* http://www.arb.ca.gov/msprog/zevprog/factsheets/reducingsmog.pdf.

> 1991 to 1994. Because of its harmful effect on children's brain development and health, the Center for Disease Control considers blood lead levels of 10 μg/dL or greater to be dangerous to children. During the years 1976 to 1980, 88 percent of all U.S. children had blood lead levels in excess of this dangerous amount; during the years 1991 to 1994, only 4.4 percent of all U.S. children had blood lead levels in excess of 10 μg/dL.[7]

EPA rules have brought great benefit to the United States without any significant economic dislocation. A recent CPR report reviewed all 30 of the available retrospective rule reviews that the EPA has conducted pursuant to section 610 of the Regulatory Flexibility Act, and each of these reviews concluded that the regulations were still necessary and that they did not produce significant job losses or have adverse economic impact on the regulated industries, including on small businesses.[8] Specifically, all of these reviews reached the following findings:

- The country has a "continued need" for regulation, meaning that a significant risk to public health or the environment exists, and that the controls called for in the regulation continue to be successful in reducing that risk.
- The regulations did not require any major modification to increase their effectiveness or reduce their costs.
- The regulations have not been unduly costly on industry nor did it have a significant adverse impact on the industry.
- Regulated entities often support existing regulations, and when they did not, they supported reform, not elimination. In several cases, the EPA received no comments from regulated entities when it reviewed a regulation.

These reviews also confirm the results of several economic studies on the employment impact of environmental regulations, which all found either that environmental regulations have a net neutral effect on jobs, or in some cases can even lead to a net increase in employment. (See Table 1 below.) These findings should not be surprising. After all, money spent on regulation contributes to the economy, because firms must buy equipment and labor services in order to comply with regulation. In some cases, regulations can also increase employment by making the affected industry more profitable and more productive. For example, in conducting its Regulatory Flexibility Act review for the Cotton Dust Standard, the Occupational Safety and Health Administration found that compliance with the standard led the textile industry to

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[7] U.S. Envtl. Protection Agency, Blood Lead Level, http://cfpub.epa.gov/eroe/index.cfm?fuseaction=detail.viewInd&lv=list.listbyalpha&r=224030&subtop=208 (last visited June 15, 2011); Rena Steinzor et. al., *A Return to Common Sense: Protecting Health, Safety, and the Environment Through "Pragmatic Regulatory Impact Analysis"* 17-18 (Ctr. for Progressive Reform, White Paper 909, 2009), *available at* http://www.progressivereform.org/articles/PRIA_909.pdf.

[8] Sid Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* 10, 20-27 (Ctr. for Progressive Reform, White Paper 1109, 2011), *available at* http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

modernize their facilities. The investments in new equipment increased the industry's productivity and profitability, enabling it to invest in additional job creation.[9]

Source	Segment of Economy Affected by Environmental Regulation	Net Impact on Employment
Bezdek et.al. (2008)[10]	Entire economy	• Increase
Morgenstern et.al. (2000)[11]	Four polluting industries	• Increase in petroleum and plastics • No statistically significant impact in pulp and paper and steel
Berman & Bui(2001)[12]	Los Angeles area (Clean Air Act)	• No evidence of decrease • Probable slight increase
Goodstein (1999)[13]	Entire economy	• 7 of 9 available studies found increase • 1 study found decrease • 1 study found mixed results

Table 1: Impact of Environmental Regulation on Employment

While the EPA has achieved remarkable success over the past 40 years, it is important not to lose sight of the fact that serious hazards remain. The EPA has several important pending rulemakings, almost all of which are long overdue—victims of the distressing state of dysfunction and delay currently afflicting the U.S. regulatory system. As described below, the continuing delay of these critical safeguards is harming public health and environmental quality:

- *Tier III Standards for Motor Vehicles.* Originally scheduled to be completed in 2012, this long-delayed rule would significantly reduce automobile emissions of harmful air pollutants, including nitrogen oxides, volatile organic compounds, particulate matter, and carbon monoxide. According to agency estimates, this rule will eventually prevent up to 2,400 premature deaths, 3,200 emergency room visits, and 1.8 million lost school days, work days and minor-restricted activities every year.[14]
- *New Source Performance Standards (NSPS) to Control Greenhouse Gas Emissions from New and Existing Power Plants.* Power plants account for roughly 40 percent of U.S. greenhouse gas emissions. Reducing greenhouse gas emissions from these sources will be essential for averting the worst consequences of climate change. For the past few years, the EPA has been

[9] OCCUPATIONAL SAFETY & HEALTH ADMIN., OFFICE OF PROGRAM EVALUATION, REGULATORY REVIEW OF OSHA'S COTTON DUST STANDARD 22, 35-38 (2000) [hereinafter OSHA, COTTON DUST REVIEW], *available at* http://www.osha.gov/dea/lookback/cottondust_final2000.pdf.

[10] Roger H. Bezdek, Robert M. Wendling, & Paula Di Perna, *Environmental Protection, the Economy, and Jobs: National and Regional Analyses*, 86 J. ENVTL. MGMT. 63 (2008).

[11] Richard D. Morgenstern, William A. Pizer, & Jhih-Shyang Shih, *Jobs versus the Environment: An Industry-level Perspective* (Resources for the Future, Discussion Paper 99-01-REV, 2000), *available at* http://www.globalurban.org/Jobs_vs_the_Environment.pdf.

[12] Eli Berman & Linda T.M. Bui, *Environmental Regulation and Labor Demand: Evidence from the South Coast Air Basin*, 79 J. PUB. ECON. 265 (2001).

[13] EBAN GOODSTEIN, THE TRADE-OFF MYTH: FACT AND FICTION ABOUT JOBS AND THE ENVIRONMENT (1999).

[14] U.S. EPA, Fact Sheet: EPA Proposes Tier 3 Motor Vehicle Emission and Fuel Standards, *available at* http://www.epa.gov/otaq/documents/tier3/420f13016a.pdf.

working on separate rules to limit greenhouse gas emission from future and existing power plants, respectively. President Obama recently made these rules the centerpiece of his comprehensive climate change plan. If implemented, these rules will go a long way toward reducing U.S. greenhouse gas emissions, leading to significant public health and environmental benefits.

- *Ozone National Ambient Air Quality Standards (NAAQS).* In September of 2011, the EPA was set to strengthen the health-based standard for ozone pollution, when the Obama Administration stepped in to block the effort at the last minute. (Prior to then, the ozone standard had not been updated since 1997, though the Clean Air Act requires reviews and updates to take place at least once every five years.) The Obama Administration justified blocking the 2011 update on the grounds that another update was set to be completed by 2014; however, the EPA's slow progress on the rule makes it more likely that the update will not be completed until 2015 or perhaps even later. The agency projects that a stronger ozone standard would annually prevent up to 12,000 premature deaths, 5,300 non-fatal heart attacks, 2,200 cases of chronic bronchitis, 420,000 lost work days, and 2,100,000 missed school days.
- *Coal Ash Disposal Rule.* Three long years have elapsed since the EPA proposed a rule to protect communities from coal ash—a byproduct of coal-power generation that's filled with toxic chemicals like arsenic, lead, and mercury—and still a final rule is still nowhere in sight. Meanwhile, power plants are dumping an additional 94 million tons of it every year into wet-ash ponds and dry landfills that are already filled to capacity. A strong rule is necessary to prevent improperly stored waste from leaking hazardous pollutants into ground and surface waters located near coal ash dump sites, potentially contaminating drinking water supplies and destroying affected aquatic ecosystems. In addition, a strong rule would help prevent future spill catastrophes, such as the one that occurred in Kingston, Tennessee, in December of 2008, when a surface impoundment collapsed, ultimately spilling 1.1 *billion* gallons of inky sludge across 300 acres of a nearby town at depths of three feet—a spill larger in quantity than the Deepwater Horizon catastrophe in the Gulf of Mexico this past summer. According to agency records, the EPA will likely not complete this rule until sometime in 2014 or even later. Even then, the EPA might issue a weak version of their originally proposed rule, which would be inadequate to protect against water pollution and spill contamination.
- *Power Plant Cooling Water Intake Rule.* When implemented, this rule will help protect delicate aquatic ecosystems by preventing harm to fish and other animal and plant species. Even though the EPA was only able to put a dollar figure on a small slice of the benefits this rule would generate, the agency still found that these limited benefits outweighed the rule's costs by a ratio of up to 14 to 1. Nevertheless, it has been subjected to a series of ongoing delays for several years.
- *Scope of the Clean Water Act Guidance/Rulemaking.* Thanks to a couple of muddled Supreme Court decisions, the scope of waters subject to jurisdiction under the Clean Water Act has been thrown into hopeless confusion, effectively

handcuffing efforts by the EPA and the U.S. Army Corps of Engineers (USACE) to protect wetlands and other ecologically significant waterbodies. The EPA has been working for more than three years on an effort to issue updated guidance that would clarify the scope of the Clean Water Act's protective authority, which would provide greater regulatory certainty to landowners, farmers, and businesses. This effort has been stymied by a series of troublesome delays. Currently, the draft final guidance remains stuck in White House review, where it has languished for nearly a year and a half—well beyond the time limit allowed. Agency records also suggest that the EPA anticipates formally codifying this guidance in a rulemaking, though whether and when this rulemaking will ever see the light of day is anybody's guess.

- *National Stormwater Program Rule*. Stormwater is a ubiquitous source of water pollution, channeling a highly polluted cocktail of motor oil, lawn fertilizer, pet waste, and other contaminants directly into lakes, rivers, and estuaries around the country. The stormwater runoff from urban areas, which constitute a mere 3 percent of the total landmass in the United States, is estimated to be the primary source of impairment of 13 percent of assessed rivers, 18 percent of assessed lakes, and 32 percent of assessed estuaries.[15] The EPA began working on a national stormwater program rule in 2009, but progress has been plagued by a series of ongoing delays. The agency is under a court order to issue a proposal by June of 2013, but it has already missed that deadline. According to agency records, the EPA has no plans to issue the proposal within the next year, which suggests that a final rule will likely not be completed until 2015 or even later.

- *Chemicals of Concern List*. Estimates vary, but it is safe to say at least 40,000 unique chemicals exist, and many of those create risks to human health and the environment. Harmful chemicals are supposed to be regulated under the Toxic Substances Control Act (TSCA), but because of various shortcomings in that statute, the EPA has little ability to limit or place restrictions on chemicals that are discovered to be harmful. Nonetheless, Congress did include a provision in TSCA that at least allows the EPA to warn the public about the dangers posed by toxic chemicals. Section 5(b)(4) of TSCA gives the EPA the authority to publish a "Chemicals of Concern List"—that is, a list of chemicals that the agency has determined "may present an unreasonable risk of injury to health or the environment," based on "all relevant factors" including hazard and exposure data specific to both humans and the environment. The EPA has drafted a proposed rule that would add several potentially harmful chemicals to the Chemicals of Concern List, including a category of eight phthalates, a category of polybrominated diphenyl ethers (PBDEs), and bisphenol A (BPA). The agency submitted for review its draft proposal to the White House Office of Information and Regulatory Affairs (OIRA) in May of 2010, and it has been stuck there ever since. Trapped for over three years—well beyond the maximum 120 days permitted under executive order—the Chemicals of Concern List proposal has become the poster child for OIRA interference.

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[15] NAT'L ACADEMIES, REPORT IN BRIEF: URBAN STORMWATER MANAGEMENT IN THE UNITED STATES (2008), *available at* http://www.nctcog.dst.tx.us/envir/SEEclean/stormwater/nrc_stormwaterreport_fs.pdf.

Together these delayed rulemakings are imposing massive costs on public health and the environment. The fact that these rules have fallen victim to continuous delays also directly refutes the claim made by regulatory opponents that agencies such as the EPA are unleashing a "regulatory tsunami."

The Repeating Pattern of Special Interest Attacks Against Public Safeguards

Despite the vast evidence demonstrating the value of their regulations, the EPA has become the target of vicious attacks by conservative policymakers and their allies in industry. In these attacks, the agency is painted as an unaccountable, power-hungry behemoth hell-bent on destroying the economy. For example, last year, the Republican congressman from Alaska Don Young penned an op-ed in which he assailed the EPA as the "Employment Prevention Agency."[16]

EPA Administrators have frequently been hauled in for hostile oversight hearings in the House of Representatives, where Republican committee members seem more concerned with hurling inflammatory invective than with learning about the agency's activities. During a heated exchange with then-EPA Administrator Lisa Jackson at a March 2010 hearing, Rep. Tim Johnson of Illinois maligned the agency as "absolutely the poster child . . . for usurpation of legislative authority." Rep. Fred Upton of Michigan, the Chair of the House Energy and Commerce Committee later remarked in 2011 that Administrator Jackson would need her own parking spot on Capitol Hill, since he planned on requiring her to testify before the committee so often.

This bullying and intimidation persists. In the recent build-up to EPA Administrator Gina McCarthy's confirmation hearing, Republican Members of the Senate Environment and Public Works Committee slammed her with more than 1,000 questions—by far the most any presidential nominee has received in history. Of this harassment, long-time congressional observer and respected political scientist Norman Ornstein remarked, "One thousand questions is beyond the point of absurdity."[17]

When the complete abandonment of even a modicum of decorum is not enough, members of Congress have resorted to punitive legislative action against the EPA. For example, the full House of Representatives is slated to vote this week on the so-called Energy Consumers Relief Act (ECRA). This bill would give another agency—the Department of Energy—the power to unilaterally veto EPA's rules based solely on its unreviewable, non-expert opinion that the rule might negatively impact the economy in some way. In short, this bill would subordinate the EPA's policy judgments on matters that are central to carrying out its statutory mission of protecting people and the environment to those of the Department of Energy. Of course, the

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[16] Rep. Don Young, Op-Ed, *Obama's EPA as an Employment Prevention Agency*, POLITICO, Mar. 15, 2012, *available at* http://www.politico.com/news/stories/0312/74072.html.

[17] Noah Bierman, *GOP presses EPA pick with 1,000 questions*, THE BOSTON GLOBE, May 16, 2013, *available at* http://www.bostonglobe.com/news/nation/2013/05/16/the-questions-keep-coming-and-coming-for-would-environmental-chief/83s5PRqKAkZ0bu9sThJYEI/story.html.

desired effect of this bill would be to delay—if not block completely—those rules, which the politically powerful energy industry finds inconvenient.

The House of Representatives' pending appropriations bill for the EPA, the Department of the Interior and related agencies for Fiscal Year 2014 is another example of punitive legislation directed toward the EPA. The bill would cut the EPA's budget by 34 percent compared to Fiscal Year 2013 levels, and well beyond the cuts required under sequestration. If enacted, this appropriations bill would cut the EPA's funding to levels that haven't been seen since the Reagan Administration. With a budget that low, the EPA would be prevented from carrying even its core mission—an effect the authors of the bill likely intended. To make matters worse, the appropriations bill is larded up with several policy riders that would prevent the agency from carrying out key components of the mission that Congress assigned to it. Among other things, these riders would prevent the EPA from using appropriated funding to work on the Tier III Standards for Motor Vehicles, the New Source Performance Standards to Control Greenhouse Gas Emissions for New and Existing Power Plants, the National Stormwater Program Rule, the Scope of the Clean Water Act Guidance/Rulemaking, and the Power Plant Cooling Water Intake Rule—virtually all of the EPA's most crucial pending safeguards.

While no doubt extreme, these attacks on the EPA are not unprecedented. The tobacco industry worked with its allies in Congress to launch a similar campaign against government programs to reduce smoking. Beginning in the 1960s, the U.S. government has instituted a series of tobacco control programs that have helped to dramatically reduce smoking rates in this country. This stands as one of the greatest public health achievements in the history of the United States, though much work remains. Tobacco use is still the leading cause of preventable death in the United States, and the reduction in tobacco use rates has slowed considerably in recent years, particularly among younger Americans.

Early government tobacco control programs began with efforts to educate the public about the health hazards of smoking and to restrict tobacco product advertising. In 1964, the publication of the Surgeon General's report, which concluded that smoking increases the chances of lung cancer and other diseases, helped to usher in a new era of public consciousness about the dangers of tobacco use. Subsequently, Congress passed laws requiring tobacco companies to include health warnings on their labels and prohibiting advertising for tobacco products on television and radio. Later in the 1970s and 1980s, the federal government continued with efforts to educate the public about the dangers of secondhand smoke. Congress also sought to discourage smoking by increasing federal taxes on cigarettes. Meanwhile, state and local governments were able to augment these efforts by prohibiting smoking in certain public places, while public health organizations began undertaking extensive campaigns to educate the public about the harms of smoking and the benefits of quitting. In the 1990s, Congress began instituting programs designed specifically to prevent people under the age of 18 from smoking. Most recently, Congress, in 2009, passed the Family Smoking Prevention and Tobacco Control Act, which authorizes the Food and Drug Administration (FDA) to regulate the sale and distribution of tobacco products, particularly with an aim toward curbing use by individuals under the age of 18.

These programs have helped to reduce the rate of tobacco use in the United States by about one-half since 1964. These reductions reflect successful efforts to prevent people from starting to smoke as well as encouraging existing smokers to quit. The reduced smoking rates in turn have yielded significant public health benefits. The National Cancer Institute estimates that federal tobacco control programs to reduce smoking helped to prevent around 800,000 deaths between 1975 and 2000.[18] Targeted federal programs have also produced promising results. The Centers for Disease Control and Prevention (CDC) worked with the State of Massachusetts on programs to help existing smokers quit. The CDC estimates that the program helped reduce participants' smoking rate by 26 percent. During the period studied, the rate of hospital admissions for program participants fell by 46 percent, while hospital admissions for other heart disease episodes fell by 49 percent.[19]

For its part, the tobacco industry has not stood idly by. During this time, tobacco companies have launched an aggressive and comprehensive campaign aimed at thwarting the government's tobacco control programs. For example, in 1979 the tobacco industry started working with the American Legislative Exchange Council (ALEC)—a secretive organization that works to advance pro-business policies—to undermine federal and state-level efforts to reduce smoking rates. Together, they waged several campaigns against tobacco control policies, including the Food and Drug Administration's (FDA) attempt to regulate nicotine as a drug in the 1990s. As part of this campaign, they sought to push members of Congress to oppose the regulations on the grounds that the FDA's regulation would infringe on states' rights.[20] They attempted to paint the agency as out-of-control and power-hungry, much as the EPA's detractors do today. Later in 1999, the tobacco industry and ALEC helped devise a "legislative plan." Part of this plan included launching a negative public relations campaign against the FDA focused on portraying the agency's tobacco regulations as overreaching and contrary to individual freedom of choice.[21]

In the late 1950s, several tobacco product manufacturers formed the Tobacco Institute, an industry trade association that worked effectively to attack tobacco control programs until it was dissolved in 1998 as part of the Tobacco Settlement Master Agreement. One of the Tobacco Institute's primary tasks was to undermine scientific studies showing adverse health effects from tobacco use, including those studies produced by the federal government. In some cases, these efforts involved direct attacks at the government with accusations of malfeasance. For instance, in response to a 1986 study by the Surgeon General on the harmful effects of secondhand smoke, the Tobacco Institute issued a press release accusing government scientists of deliberately "attempt[ing] to censor the views of independent scientists and abuse science on the question of

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[18] Press Release, National Cancer Institute, Nearly 800,000 Deaths Prevented Due to Declines in Smoking; NIH Study Examines the Impact of Tobacco Control Policies and Programs, and the Potential for Further Reduction in Lung Cancer Deaths (Mar. 14, 2012), *available at* http://www.cancer.gov/newscenter/newsfromnci/2012/TobaccoControlCISNET (last visited July 29, 2013)

[19] Centers for Disease Control and Prevention, *Chronic Disease Prevention and Health Promotion: Tobacco Use: Targeting the Nation's Leading Killer at a Glance 2011*, http://www.cdc.gov/chronicdisease/resources/publications/aag/osh.htm (last visited July 29, 2013).

[20] Anne Landman, *ALEC and the Tobacco Industry*, THE CENTER FOR MEDIA AND DEMOCRACY'S PR WATCH, July 15, 2011, *available at* http://www.prwatch.org/news/2011/07/10787/alec-and-tobacco-industry (last visited July 29, 2013).

[21] *Id.*

cigarette smoke in the air and the health of nonsmokers."[22] Today, opponents of the EPA routinely make similar accusations against the agency regarding their findings related to the science of climate change.

The Causes of Regulatory Dysfunction and Delay

I appreciate the committee taking up the critical issue of regulatory delay and the costs it imposes on the public interest. For too long on Capitol Hill, the debate on regulation has focused on only one side of the story. Self-righteous crusaders against regulators have become fond of railing against the "costs" that come with regulatory decision-making, but they conveniently ignore the most critical question: Costs for whom? Industry, or the public that suffers from industry's polluting activities? By ignoring this question, opponents of regulation are free to continue pretending that if we dismantled the regulatory system, we would suffer no negative consequences and instead reap a windfall in saved money.

A big part of the reason that opponents of regulation have been able to ignore the costs of delay is because no conscious effort has been made to identify and aggregate these costs. My organization attempted to shine a light on these costs in a 2009 white paper.[23] The white paper concluded that delays of just three rules imposed unconscionable, preventable costs on society every year, including:

- The birth of 94,000 children with elevated blood mercury levels (*i.e.*, levels high enough to leave them with irreversible brain damage) as the result of a delayed rule to control toxic air pollution from power plants;
- An estimated $1 billion in damages caused by the proliferation of zebra mussels, an invasive species, in the Great Lakes as the result of a delayed rule to prevent the spread of invasive species through ballast water discharges; and
- 53 premature deaths and 155 non-fatal injuries as the result of a delayed regulation to prevent accidents involving cranes and derricks at construction sites.

By contrast, several dubious efforts have been made to attach a dollar figure to the total compliance costs that regulations impose. The efforts include the White House Office of Management and Budget's (OMB) annual *Report to Congress on the Benefits and Costs of Federal Regulation* and the thoroughly debunked "Crain and Crain" study, produced under contract for the Small Business Administration's Office of Advocacy.

As a preliminary matter, I would urge this subcommittee to use its oversight authority to obtain a better accounting of the costs of regulatory delay. A good place to start would be to direct the OMB to identify and document the costs of regulatory delay as part of its annual *Report to Congress on the Benefits and Costs of Federal Regulation.* The annual OMB report is fundamentally flawed in that it only considers the costs and benefits that result once a regulation

[22] Press Release, The Tobacco Institute, Government Health Officials Involved in Efforts to Censor Dissenting Scientific Views (Dec. 11, 1986), *available at* http://legacy.library.ucsf.edu/tid/btw19e00/pdf.
[23] Catherine O'Neill et al., *The Hidden Human and Environmental Costs of Regulatory Delay* (Ctr. for Progressive Reform, White Paper 907, 2009), *available at* http://www.progressivereform.org/articles/CostofDelay_907.pdf.

has been completed. But costs and benefits result from regulations that are unreasonably delayed. Invariably, the benefits of delayed rules flow to industry while the costs flow to the public at large. By ignoring the impacts of delayed rules, the annual OMB report presented a distorted picture of how well the regulatory system is performing. Accordingly, this subcommittee should direct the OMB to expand its annual report to include a list of rules that are being unreasonably delayed and a qualitative or quantitative description of the costs that are being imposed on the public interest as a result of that unreasonable delay.

Beyond this preliminary exercise of attempting to get a better grasp of the size and scope of the problem of regulatory delay, I would also urge this committee to investigate several of the contributing causes of what I call "regulatory dysfunction," or the persistent and severe failure of agencies to carry out the missions that Congress has assigned to them. There are many symptoms of "regulatory dysfunction," and "regulatory delay"—the topic of today's hearing—is one of the most important of those symptoms. The causes of "regulatory dysfunction" largely fall into the following four categories:

- *Political Interference*. On a daily basis, agency staff are engaged in the important, if mundane, analysis of science and policy that enables them to understand and respond to the threats facing workers, consumers, and the environment. Unfortunately, over the last 30 years, this work, which Congress specifically delegated to agencies because of the specialized training and expertise of their staff, has increasingly come under strict oversight and control by the political denizens of the White House. OIRA—which serves as the primary choke point for new regulations as they go through centralized review pursuant to Executive Orders 12866 and 13563—provides perhaps the most troubling illustration of political interference. Any rule that might trouble a politically powerful constituency will be reviewed at least twice by OIRA. During these reviews, a steady stream of industry lobbyists use OIRA as a court of last resort to weaken or block any pending regulations that they find inconvenient. Critically, agencies may not publish a proposed or final rule that is undergoing review until it has received OIRA's blessing, which sometimes means agreeing to drastic changes to the rule's substance. The EPA's recently proposed effluent limitation guidelines (ELG) for power plants illustrates this dynamic. Several industry groups lobbied OIRA while the draft proposal was undergoing OIRA review. By the time it emerged, OIRA had forced the EPA to include several new weaker "regulatory options" and to abandon its original "preferred" regulatory options—which were stronger—in favor of the new weaker ones. As documented in a recent CPR white paper, this OIRA-led political interference in agency rules follows a broader trend. The white paper studied 10 years' worth of data covering OIRA reviews, and found that when industry lobbied OIRA, the review was more likely to be delayed, going beyond the 120-day limit permitted by Executive Order 12866. The white paper also found that rules were more likely to be changed during those OIRA reviews in which industry lobbied.[24]

[24] Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 2011), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

- *Inadequate Resources.* Regulatory agencies are chronically underfunded. For decades, the U.S. population and workforce have grown, the consumer products industry has ballooned, and threats to the environment have become increasingly intractable. Yet all the while, these agencies' budgets, staff, and resources have failed to keep pace. The Consumer Product Safety Commission (CPSC) is the poster child for agencies that strive to achieve broad statutory mandates with woefully insufficient resources. It is responsible for ensuring the safety of almost every durable good that U.S. consumers buy, from lamps to computers. Its jurisdiction covers more than 15,000 categories of products; or, put another way, it covers everything but food and drugs; automobiles, boats, and airplanes; alcohol, tobacco, and firearms. The consumer goods that CPSC regulates are designed, manufactured, and sold through a complex, multibillion dollar international supply chain, yet the agency operates with a staff of just over 500 employees working on what is, comparatively speaking, a shoestring budget of about $115 million. The small budgets impair the ability of the CPSC and other agencies to issue regulations required by law in a timely and effective manner. It also impairs these agencies' ability to implement and enforce those regulations that are already on the books, which has led to full-scale industrial catastrophes, such as the BP Oil Spill in the Gulf of Mexico and the Upper Big Branch mine explosion. At the time of the BP Oil Spill, the Department of the Interior agency that regulated offshore oil drilling was responsible for regulating about 3,795 offshore production platforms and managing about 8,124 active oil and gas leases on approximately 43 million acres of the outer continental shelf. That agency, however, only had about 60 inspectors to police those drilling activities.[25]
- *Outmoded Laws.* Regulatory agencies' ability to respond to all of the health and environmental threats in their domain is constrained by laws that were conceived at a time when Congress had a fundamentally different understanding of both the threats to be regulated and the agencies' capacity to address those threats. In the intervening years, knowledge about science, public administration, and regulatory policy has evolved, but the statutes that set the boundaries on the protector agencies' powers have remained largely the same. For example, flaws in the Toxic Substances Control Act (TSCA)—the only major environmental law to have never been updated—make it all but impossible for the EPA to adequately protect the public and the environment against hazardous chemicals. Outmoded laws also undermine agency enforcement efforts. Under the Occupational Safety and Health Act, the penalties for a first-time conviction for a willful violation of the statute that results in a worker's death are limited to $10,000 and six months in jail.[26] By comparison, the maximum penalty for harassing a wild burro on public lands is one year in jail.

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[25] Opening Statement of Rep. Bart Stupak, Chairman, Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, *Hearing on the Role of the Interior Department in the Deepwater Horizon Disaster, Before the Subcomm. on Energy and Environment and the Subcomm. on Oversight and Investigation of the H. Comm. on Energy and Commerce* 1 (July 20, 2010), *available at* http://energycommerce.house.gov/documents/20100720/Stupak.Statement.07.20.2010.pdf.

[26] 29 U.S.C. § 666(e).

- *Bureaucracy Bashing.* It would be bad enough if the public servants that work for federal agencies have to contend with the difficult circumstances outlined above. To make matters worse, though, their hard work, dedication, and expertise are regularly marginalized by politicians. Together, these conditions are contributing to a demoralized federal workforce. A demoralized federal workforce, in turn, threatens to add to regulatory dysfunction on two important fronts. First, it is difficult to retain workers who feel undervalued. These workers include the senior career employees who are essential to the effective functioning of agencies. Second, the demoralized workers who remain on the job are less likely to be strong ambassadors who will attract the best and brightest new employees.

Thank you. I'd be pleased to answer any questions you may have.

PREPARED STATEMENT OF SAM BATKINS WITH ATTACHMENTS

Justice Delayed: The Human Cost of Regulatory Paralysis

United States Senate
Committee on the Judiciary
Subcommittee on Oversight, Federal Rights, and Agency Action

Sam Batkins
Director of Regulatory Policy
American Action Forum

August 1, 2013

Chairman Blumenthal, Ranking Member Hatch, and Members of the Subcommittee, thank you for the opportunity to appear today. In this testimony, I wish to make three basic points:

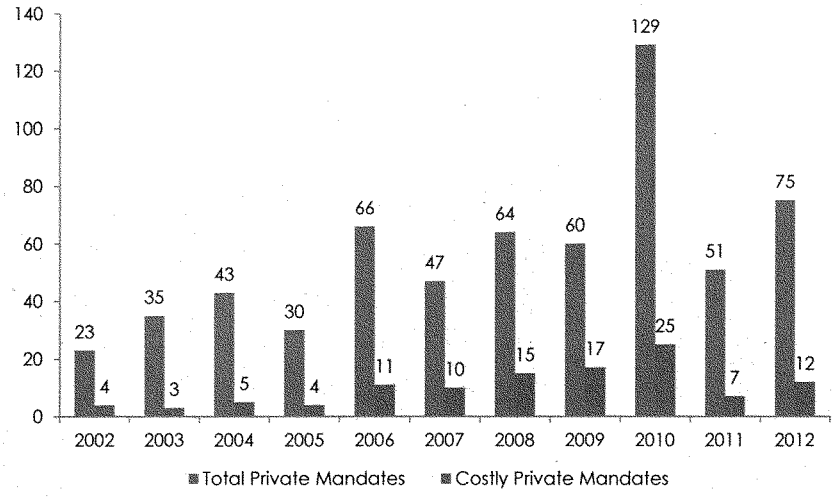
- The number of "major" regulations (those with an impact of $100 million or more) and the amount of federal paperwork have increased significantly during the past five years,
- Existing regulatory delays are often the product of hundreds of new requirements from Dodd-Frank and the Affordable Care Act, and
- With more than 9,100 different collections of information, the federal government struggles to administer veterans' benefits, manage the nation's immigration system, and approve basic private actions.

Let me provide additional detail on each in turn.

I. Putting Regulatory Growth in Perspective

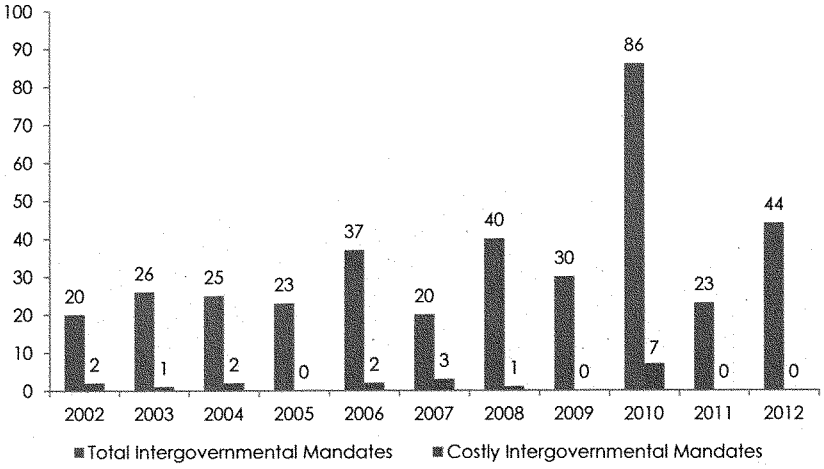
There is serious debate in the policy community about whether the costs and number of federal regulations are increasing. Rather than debate the *ex ante* versus *ex post* estimates and the value of comprehensive cost-benefit analyses, we present the following data, which is from the Congressional Budget Office (CBO) and the Office of Information and Regulatory Affairs (OIRA).

The following two charts display CBO data on the number of private-sector and unfunded mandates contained in congressional legislation from 2002 to 2012. CBO provides this data under the Unfunded Mandates Reform Act (UMRA). There is no doubt that part of the regulatory growth in recent years is a product of legislative mandates. In 2009 and 2010, Congress imposed 189 private-sector mandates; the 129 mandates passed in 2010 was the highest amount CBO has ever recorded.

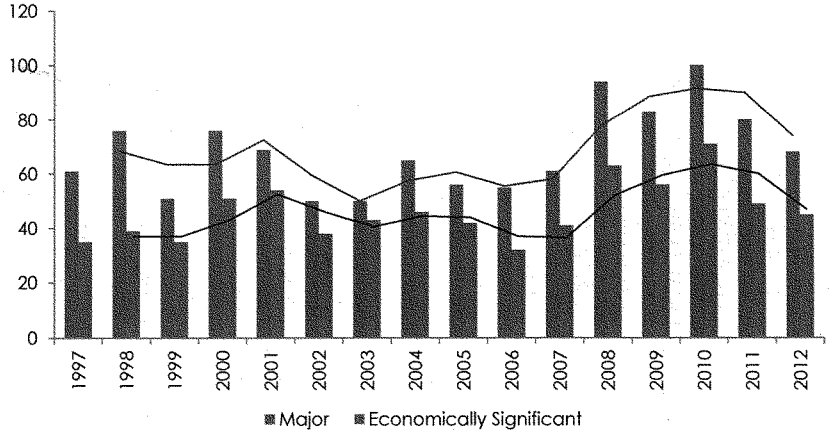


More important than the sheer number of mandates, CBO also records whether mandates exceed the statutory threshold under UMRA (currently at $150 million). In 2010, Congress passed 25 mandates that would likely exceed the statutory threshold, easily the highest figure on record and more than triple the yearly average from 2002 to 2008.

CBO also tracks the number and extent of unfunded mandates on states and local entities. In 2009 and 2010, Congress passed, and the President signed, 116 unfunded mandates. Although there are few intergovernmental mandates that exceed the statutory threshold (currently at $75 million), there were seven such instances in 2010, more than the previous five years combined. It is clear that current regulatory burdens have legislative roots of historic proportions.



These figures on mandates are important because they eventually become federal regulations and translate into real costs for private entities and states. The graph below moves past mandates in legislation to "major" and "economically significant" final regulations. Although there are some differences between the two terms, both have a $100 million economic impact threshold. The Government Accountability Office (GAO) transmits major rule reports to Congress after the agency certifies "major" status. As the chart displays, 2010 was also a record year for federal regulation. The federal government published 100 major rules that year. In addition, there were 71 economically significant regulations in 2010, the highest on record.



Despite the relative slowdown in 2012, the moving average trend line for major rules is still at one of the highest points in history. Some have attributed the decreased regulatory pace in 2012 to election year politics. Although there is no evidence that political actors purposefully stopped some regulations, there was a significant surplus of rules that had been under review at OIRA for more than 90 days. In October of 2012, 84 percent of all rules were under OIRA review for more than 90 days. Today, that figure stands at 55 percent.

Through the first six months of 2013, the federal government has published 31 major rules, putting regulators on pace for approximately 62 by the end of the year. However, the federal government has scheduled (based on Unified Agenda data) several notable rules in the coming months, including five different energy efficiency standards, three major Affordable Care Act rules, and several Dodd-Frank regulations.

Growing Red Tape

Beyond the number and cost of federal rulemakings, the American Action Forum also tracks how federal agencies impose paperwork burden hours. Based on our current data for 2013, the federal government has imposed 85 million paperwork burden hours (54.6 million from final rules and 29.9 million from proposed rules).

In the aggregate, OIRA reports that Americans spend more than 10.34 billion hours annually completing federal paperwork.[1] The supposed cost for this paperwork is $72.8 billion, or $7.04 per hour, less than the federal minimum wage. There are two other measures to monetize the nation's 10.34 billion hour burden: the median wage of a "compliance officer" ($31.23) or the real Gross Domestic Product per hour worked ($60.59). Using these two figures, the monetized burden of federal paperwork ranges from $322 to $626 billion annually. These figures include only the paperwork costs of regulation, not deadweight losses or other capital costs.

It is undeniable that federal red tape is growing, and will likely continue to trend upwards with the implementation of the Affordable Care Act and Dodd-Frank. Based on the most recent Information Collection Budget of the U.S., the federal government added 355 million hours in the last fiscal year.[2] To put this figure in perspective, assuming a 2,000-hour work year, it would take 177,500 employees to comply with the new paperwork. Added regulatory burdens, however, should not be thought of as a jobs program.

The figure below details the aggregate cabinet-level paperwork burden, with the Department of Treasury excluded. Treasury imposes more than 7.8 billion hours of paperwork, 75 percent of the government-wide total, so a major Treasury collection of paperwork can shift the overall figure. Excluding Treasury gives a more accurate depiction of how government paperwork has changed, rather than a reflection of tax changes at one agency.

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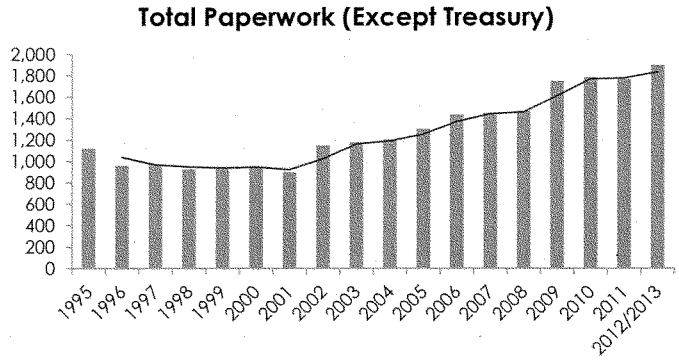
[1] OIRA, Inventory of Currently Approved Information Collections, available at http://www.reginfo.gov/public/do/PRAReport?operation=11.

[2] Office of Management and Budget, Information Collection Budget of the United States Government, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb_2012.pdf.



The trend in paperwork is continued growth, especially during the past five years. From 1995 to 2008, the non-Treasury related paperwork averaged 1.13 billion hours. During the past four years, that average has risen to 1.8 billion, a 58 percent increase. Assuming the wage rate of a compliance officer, the added non-Treasury paperwork since 2008 has cost $56.2 billion.

From 1995 to 2001, the non-Treasury burden fell by more than 220 million hours. This demonstrates that the federal government can cut paperwork and still protect public health and safety. The Departments of Labor and Defense have reduced their paperwork burden since 1995 but it is obvious that other agencies have failed to restrain their red tape.

OIRA's Report to Congress

Given the debate over federal regulations, OIRA helped to settle matters when it reported that 2012 was the costliest year on record.[3] At $19.5 billion (in 2001 dollars), last year surpassed the second highest year by 57 percent. Despite record costs, OIRA failed to report record benefits.

OIRA reported these figures from only 14 rules, or one-third of one percent of all federal rules issued during FY 2012. In comments submitted to OIRA, the American Action Forum reviewed all rules with either monetized costs or benefits.[4] We found OIRA correctly reported total benefits, approximately $100 billion, but by including all rules, costs rise to $29.5 billion (in 2001 dollars), an increase of 52 percent over OIRA's high-end cost projection.

We should put these figures in perspective. Based on, CBO's latest strategies for reducing the deficit, "Spending and Revenue Options," raising each tax bracket by one percentage point

[3] 2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf.

[4] American Action Forum, Comments on 2013 Report to Congress on the Benefits and Costs of Federal Regulations available at http://americanactionforum.org/topic/comments-2013-report-congress-benefits-and-costs-federal-regulations.

would generate $48 billion annually during the next ten years.[5] Adjusting OIRA's figure to today's dollars yields annual costs of $25.7 billion, and adjusting our data results in $38.9 billion in costs. Regulatory costs do not directly translate to tax increases but these new rules are far from trivial. More importantly, regulations never receive the same public scrutiny as major tax changes.

II. Regulatory Delays from the Affordable Care Act, Dodd-Frank

As discussed, Dodd-Frank and the Affordable Care Act have generated substantial regulatory growth within the past three years. With strict legislative timelines and hundreds of new rules, the pace of regulation has exceeded the capacity of regulators to promulgate some rules.

For the Affordable Care Act, the administration has already finalized 96 rules. When we analyzed implementation earlier this year, we found 36 percent of the regulations in proposed form were late, with four rules already missing their final rule deadline.[6] At the third anniversary of the law, the American Action Forum found 29 missed deadlines.

The missed deadlines do not tell the entire regulatory history of the law. Beyond the tax implications and the employer mandate, the administration admits considerable regulatory burdens for small businesses. Under the Regulatory Flexibility Act, agencies must certify whether a regulation will have a "significant economic impact on a substantial number of small entities" (SISNOSE). According to the administration, there were 11 regulations (eight final and three proposed rules) that triggered this SISNOSE threshold.

Although Congress never defined SISNOSE in the Regulatory Flexibility Act, HHS describes it as any regulation that will raise prices or reduce revenues by three to five percent within a five-year period. In other words, there are eleven regulations, and possibly more in the future, that will act as a regulatory tax for small businesses. The initial cost for these measures is $1.9 billion and 11.3 million paperwork burden hours.

Based on data from OIRA, the Affordable Care Act has substantially increased HHS's paperwork burden. In FY 2009, HHS imposed 494 million hours of paperwork. Today, HHS collects more than 1,180 different OMB control numbers and imposes more than 621 million hours of paperwork, a 25 percent increase. From 1995 to present, HHS's paperwork burden has increased fourfold. In fact, the amount of paperwork might be too much for the agency to manage. According to OIRA data, HHS has violated the Paperwork Reduction Act 154 times in the past three years, more than any other agency.[7]

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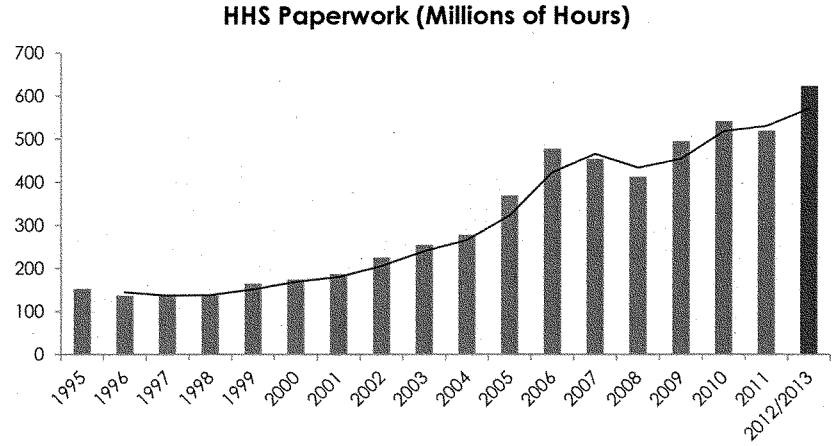
[5] Congressional Budget Office, Collected Tables for Spending and Revenue Options, available at http://www.cbo.gov/publication/42307.

[6] American Action Forum, The Affordable Care Act's Past, Present, and Future, available at http://americanactionforum.org/topic/health-care-implementation-train-wreck-looming-affordable-care-acts-past-present-and-future.

[7] Agencies Fail to Comply with Paperwork Reduction Act, available at http://americanactionforum.org/topic/regulatory-lawbreakers-agencies-fail-comply-paperwork-reduction-act.



For Dodd-Frank implementation, the regulatory backlog is less a product of OIRA and more a result of the sheer number of new rules prescribed by the law. According to many estimates, Dodd-Frank will impose approximately 400 regulations. Based on figures from Davis Polk, a law firm that tracks implementation, regulators have already missed 175 deadlines, or 62 percent of the legislative targets; approximately one-third of the law has not yet been proposed.[8]

Quantifying the impact of Dodd-Frank implementation is less certain because many independent agencies omit cost-benefit analyses and are not subject to OIRA review. However, requirements under the Paperwork Reduction Act force agencies to list paperwork burden hours. We have tracked 58.5 million hours from Dodd-Frank to date, with 55 million attributable to final rules. With a median cost of compliance of approximately $100 per hour for rules that do monetize paperwork compliance, the burden of 58 million hours eclipses $5.8 billion.

Furthermore, according to OIRA, agencies have finalized 25 major rules implementing Dodd-Frank. The Commodity Futures Trading Commission (CFTC) is responsible for 16 of those 25 major rules. With approximately two-thirds of Dodd-Frank still to be finalized, the number of major rules and paperwork hours will only increase.

III. Regulatory Duplication and Delay

The focus of this hearing is on delayed rules but regulatory growth adds to duplication within the current system and causes delays for immigrants, veterans, and U.S. companies.

[8] Davis Polk, July 2013 Dodd-Frank Progress Report, available at http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report/.

This spring, GAO released its annual report on federal "Fragmentation, Overlap, and Duplication."[9] The report found 17 areas of duplication, and based on these findings, we replicated GAO's methodology for overlap in paperwork requirements. The spending equation of government duplication totals approximately $365 billion, according to Senator Tom Coburn, but regulatory duplication also has a price.[10] Based on the 17 areas of duplication, we found 642 million paperwork hours, $46 billion in costs, and 990 forms of federal overlap. For example, ten different agencies are involved in renewable energy programs and produce 96 related forms.[11]

This duplication has real implications for Americans interacting with government every day. In a well-documented failure, there are more than 600,000 veterans waiting on benefit claims. These wait times are a result of the surge in veterans applying for benefits and the maze of paperwork in the current system. The American Action Forum found more than 600 different forms relating to veterans' claims, imposing millions of paperwork burden hours.[12] Some veterans undergo briefings on the application process alone, with the expectation that benefits will not arrive promptly.

The regulatory maze also affects the nation's broken immigration system. There are more than 150 immigration-related regulations, involving seven different cabinet agencies. The paperwork cost of managing the current system approaches $30 billion. We found that a hypothetical immigrant's path to citizenship could involve 16 forms, 18 hours of paperwork, and $2,500 in direct paperwork costs.[13]

OIRA Review, Changes to Rules

Delays at OIRA might garner plenty of criticism but the office plays a vital role in reviewing agency actions. There are some instances when OIRA failed to check flawed regulations, frustrating conservatives and progressives alike.[14] For example, last year when EPA issued its new biodiesel standard, above the statutory baseline, the agency conceded the rule would cause up to $52 million in environmental "disbenefits" from dirtier air and water. EPA noted, "Impacts on water quality, water use, wetlands, ecosystems, and wildlife habitats are expected to be directionally negative."[15] The final rule spent more than two months at OIRA but the office nevertheless approved a rule that imposes significant economic and environmental costs.

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[9] Government Accountability Office, 2013 Annual Report: Actions Needed to Reduce Fragmentation, Overlap, and Duplication and Achieve Other Financial Benefits, available at http://www.gao.gov/assets/660/653604.pdf.
[10] Senator Tom Coburn, Letter to Deputy Director Jeffrey Zients, available at http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=feba26e1-7102-4a0f-bb55-a91e7477d98f.
[11] American Action Forum, Weeding Out Regulatory Duplication, available at http://americanactionforum.org/topic/weeding-out-regulatory-duplication.
[12] American Action Forum, Red Tape Challenges to America's Veterans, available at http://americanactionforum.org/topic/red-tape-challenges-america%E2%80%99s-veterans.
[13] American Action Forum, The Intersection of Immigration and Regulation, available at http://americanactionforum.org/topic/intersection-immigration-and-regulation.
[14] Sofie Miller, Crony Environmentalism, available at http://www.cato.org/sites/cato.org/files/serials/files/regulation/2013/3/v36n1-14.pdf#page=1.
[15] Regulation of Fuels and Fuel Additives: 2013 Biomass-Based Diesel Renewable Fuel Volume, 77 FR 59,459, available at http://www.federalregister.gov/a/2012-23344/p-70.

There is a common assumption that the longer a rule is under review at OIRA, the more the office distorts it and changes the cost-benefit calculus. Although there are anecdotal examples of OIRA altering certain rules, there are few studies providing a comprehensive overview of the change in costs and benefits during the life of a rulemaking.

The American Action Forum reviewed 160 final rules published in 2012 and 2013 to determine how costs change between proposed and final rule status. A plurality of rules had increased costs: 74 of the 160 rules studied (46 percent) had higher costs in the final stage than when originally proposed; 46 rules (28 percent) had lower costs; and 40 had no change (25 percent).

In a testament to OIRA's role, financial regulations, primarily from independent agencies, had the wildest swings, with costs increasing by more than 1,691 percent from proposed to final rule. Environmental rules, typically under OIRA review, increased by 41.3 percent, far below the average of the sample (401 percent increase).

OIRA is often specifically criticized for reviews that extend beyond the limit of 90 days. But rules subjected to a final review longer than 90 days actually experienced an average percent change *below* the overall average for costs. Critics may have other reasons to chastise OIRA for lengthy rule reviews, such as contending that delays expose the public to needless risk, but there is no statistical evidence that OIRA is unduly distorting the cost-benefit calculus of rules by holding them for a longer period.

Likewise, reviewing the 14 major rules issued in FY 2012 that provided both costs and benefits reveals that benefits frequently increase during the rulemaking process. Of the 14 major rules, seven (50 percent) had increases from proposed to final, four (28 percent) had decreases, and three (21 percent) had no change. For costs, three (21 percent) had increases, six decreased (43 percent), and three had no change (21 percent).

Rule	RIN	Proposed Cost (in millions)	Final Cost (in millions)	Net Change	Percent Change
Administrative Simplification: Standards	0938-AQ11	N/A	$3	N/A	N/A
Administrative Simplification: Health Plan	0938-AQ13	$532	$532	$0	0%
Adoption of Operating Rules for EFTs	0938-ARO1	N/A	$262	N/A	N/A
Hazard Communication	1218-AC20	$79	$193	$113	143%
Standards for Organisms in Ships' Ballast	1625-AA32	$134	$74	$-60	-45%
Standards for Fluorescent Lamp Ballasts	1904-AB50	$357	$407	$50	14%
Standards for Residential Clothes Washers	1904-AB90	$173	$173	$0	0%

Standards of Performance for Petroleum Refineries	2060-AN72	$83	$69	$-13	-16%
MATS (Utility MACT)	2060-AP52	$9,310	$8,200	$-1,110	-12%
Oil and Natural Gas Sector: NSPS	2060-AP76	$647	$162	$-485	-75%
CAFE for 2017 and Later Model Year Vehicles	2060-AQ54	$8,665	$8,828	$163	2%
National Registry: Medical Examiners	2126-AA97	$516	$282	$-234	-45%
Hours of Service of Drivers	2126-AB26	$401	$393	$-8	-2%
Positive Train Control Systems (RRR)	2130-AC27	$21	$21	$0	0%

This data does not reveal exactly why rules change or what specifically OIRA does to amend the cost-benefit calculus. In all levels of government, transparency is paramount, and any information OIRA can provide to explain these changes during the life of a rulemaking would certainly be welcome.

IV. Conclusion

No one doubts that federal regulation provides benefits to consumers, workers, and the environment. Taxes also provide benefits. However, both taxes and regulations should be transparent, accountable, and subject to rational limitations. Raising taxes obviously involves extensive media coverage but the billions of dollars in new regulatory costs each year is far less visible. Like our tax burden, regulatory burdens should be transparent and all agencies should take the necessary procedural steps to justify significant new requirements.

The House on Regulation: REINS Act 2.0

By Sam Batkins
July 30, 2013

Bill Could Save $50 Billion in Regulatory Costs

Later this week, the House of Representatives will vote on H.R. 367, the "Regulations From the Executive in Need of Scrutiny Act" (REINS Act), sponsored by Representative Todd Young (R-IN). H.R. 367 provides Congress with the ability to conduct oversight of major rulemakings by regulators. The legislation is being considered at a time when regulators have pending rules that cost more than $50 billion. This represents an increase of approximately $10 billion since the House passed a similar measure two years ago.

Currently, one of the few effective checks Congress holds over final rules is the ability to pass a joint resolution of disapproval under the Congressional Review Act (CRA). Under this framework, Congress can only overturn a regulation after a rule is final. Congress has only used this tool once when it successfully overturned an ergonomics regulation from the Occupational Safety and Health Administration.

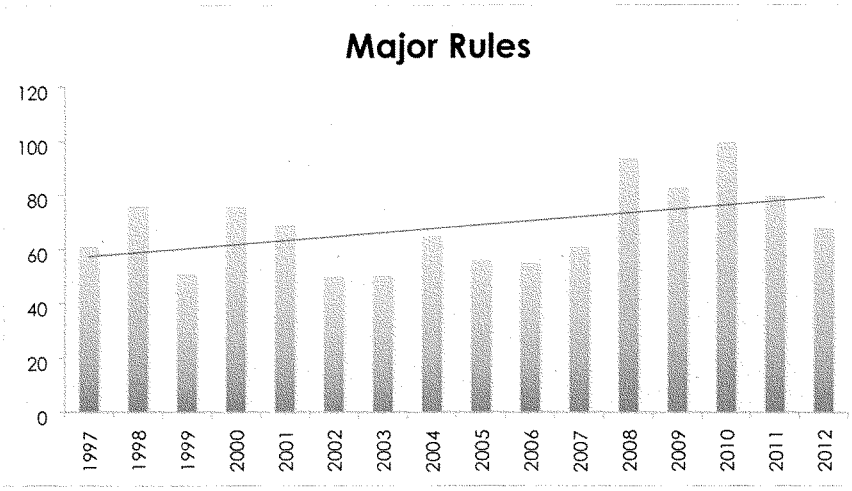
The REINS Act would require that Congress pass a joint resolution of approval before any major rule (those with an annual economic effect of more than $100 million) takes effect. Introducing a legislative check before a rule becomes effective could produce greater oversight of the regulatory process. It could even potentially enhance collaboration between the legislators that authorize certain actions and the administration.

Looking at 2013 alone, the top five major proposed rules to-date cost $47.5 billion and impose nearly 11 million paperwork burden hours. To put that in perspective, these five rules alone account for roughly 90 percent of the total costs of proposed rulemakings so far in this year. Excluding deregulatory measures that cut costs, the total burden of pending regulations is $52 billion and 31 million paperwork burden hours.

Regulation	Cost	Paperwork Hours
Tier 3: Control of Air Pollution from Vehicles	$35.1 billion	160,942
Importation of Food: Supplier Verification	$4.7 billion	N/A
Preventive Controls for Human Food	$3.3 billion	8,823,932
Standards for Growing, Harvesting Human Food	$3.2 billion	1,287,580
Reporting of Security-Based Swap Information	$1.1 billion	654,300
Totals	$47.5 billion	10.9 million

In theory, if REINS became law, Congress would have the chance to vote on these measures once the rule is deemed "major." Nothing would compel Congress to reject all expensive regulations, but they would have the opportunity to review every major rule.

As demonstrated by the graph below, there is reason to believe major rules will continue to weigh heavily on the country's regulatory burden. Since 1997, there has been a steady overall increase in the pace of major rulemaking, with record-breaking activity in 2010.



The spike in 2010 is partially due to implementation of the Affordable Care Act and Dodd-Frank. The "major rule" designation is particularly important with regard to Dodd-Frank because many of its rulemakings emanate from independent agencies. As such, they escape the "economically significant" designation (despite the fact that both it and a "major" designation are very similar), and avoid review from the Office of Regulatory and Information Affairs.

Earlier this month marked the third anniversary of Dodd-Frank, and AAF examined the Act's regulatory cost. With costs already exceeding $15 billion dollars and nearly one third of its directed rulemakings still un-proposed, it is an area worthy of additional oversight.

The House is likely to pass REINS this week but it is unlikely that these $52 billion in regulatory proposals will receive significant oversight. A majority of the lawmaking today resides with federal agencies, and absent a legislative overhaul like REINS, regulators will continue to wield enormous power.

Regulatory Lawbreakers: Agencies Fail to Comply With Paperwork Reduction Act

By Sam Batkins
July 11, 2013

Under the Paperwork Reduction Act (PRA), businesses and individuals are required to submit and retain federal forms. Contrary to its name, the Act hasn't resulted in drastic reductions in paperwork, with the current burden at 10.3 billion hours of regulatory compliance. There are penalties, including fines, for failure to comply for individuals. But what happens when federal agencies don't comply with the PRA?

In the past three fiscal years, dozens of agencies have ignored the PRA, either by collecting information without proper approval or allowing collections to lapse without following the renewal process. The worst offender of the PRA, by far, is the Department of Health and Human Services (HHS), at 31.5 percent of all violations. With more than 150 violations since FY 2009, it has received "Poor" marks from the Office of Management and Budget within the White House. The closest offender to HHS is the Department of Defense, with 88 violations.

Biggest Offenders of PRA (past three fiscal years)

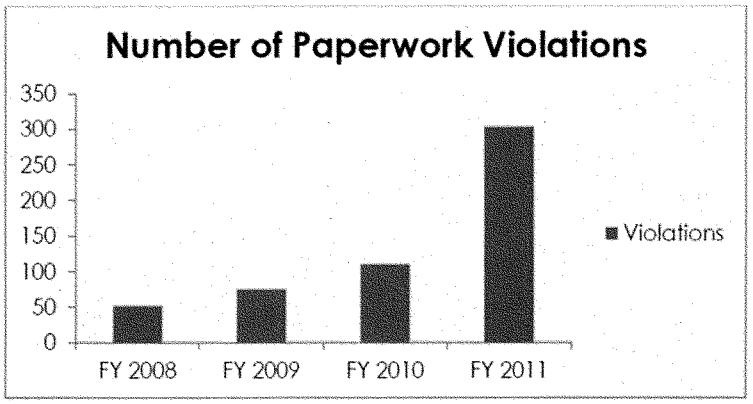
Agency	Total Violations	Average Grade
Health and Human Services	154	Poor
Defense	88	Poor
Housing and Urban Development	35	Needs Improvement
Transportation	34	Needs Improvement
Homeland Security	24	Needs Improvement

Based on grading scale from the most recent OIRA report, issued in 2013.

In the past three fiscal years, dozens of agencies have ignored the PRA, either by collecting information without proper approval or allowing collections to lapse without following the renewal process. The worst offender of the PRA, by far, is the Department of Health and Human Services (HHS), at 31.5 percent of all violations. With more than 150 violations since FY 2009, it has received "Poor" marks from the Office of Management and Budget within the White House. The closest offender to HHS is the Department of Defense, with 88 violations.

Violations Getting Worse

Due to an expanded methodology to capture more violations, OIRA reported 303 violations of the Paperwork Reduction Act in FY 2011 across all agencies. As previous reports mention, this trend has only accelerated. "OMB is reporting 110 violations during FY 2010. This is an increase of 34 violations from FY 2009 and an increase of 57 violations from FY 2008."



This expanded methodology vaulted Defense over HHS in the most recent fiscal year, but as the results show, HHS has been a serial offender. In FY 2010 alone, Secretary Sebelius's department managed ten times more violations than the second highest offender, the Department of Veterans Affairs.

Top Offenders by Year

	Defense	Health and Human Service	Veterans Affairs
FY 2011	74	68	-
FY 2010	-	65	6
FY 2009	11	21	-

HHS: Late, Wrong, and Unlawful?

HHS has received significant criticism for its implementation of the Affordable Care Act (ACA). With dozens of regulations on the books, it has already created significant delays and errors. The department has made more than 149 corrections to ACA regulations. In addition, there are still dozens of overdue regulations, with many more remaining in 2013.

This regulatory backlog has resulted in more than 150 violations of the PRA and a burgeoning regulatory apparatus that now imposes 621 million hours of paperwork, the equivalent of 311,000 employees working 2,000 hours a year. HHS lacked the legal authority to compel the collection of information, but still imposed the paperwork. The White House's own FY 2010 report noted that HHS drives a majority of PRA offenses, "This increase is largely driven by the 65 PRA violations from Department of Health and Human Services, which represents nearly 60 percent of total violations." The report defensively noted that the violations produce less than one percent of the overall paperwork burden. However, the 65 violations in FY 2010 represented 5.4 percent of HHS's total, the equivalent of 29.2 million paperwork burden hours that the agency illegally collected.

A few of these illegal collections are associated with ACA implementation. Seven collections of information, including rules for health care exchanges, total more than 707,000 hours of paperwork and $13.6 million in costs. HHS allowed the collections to lapse but continued to collect information without legal authority.

Illegal Affordable Care Act Collections

Regulation	Hours	Costs
Establishment Grants for Exchanges	262,115	$13,131,365
ACA Enrollment Opportunity	259,066	N/A
Insurance Web Portal	101,958	N/A
Grandfathered Health Plans under ACA	53,200	$330,000
Cooperative Agreements for ACA Exchanges	25,698	$112,177
Disclosure Requirements under ACA	5,100	$53,700
Dual Eligibles and Medicare Beneficiaries	494	N/A
Totals:	707,631 hours	$13.6 million

Reform Measures

In the PRA there are certain "Public Protections" but, of course, no penalties for agencies that fail to comply with the law. Although there are no pending legislative measures intended to enforce compliance among agencies, there are companion bills in the House and Senate that protect small businesses. The "Small Business Paperwork Relief Act" (S. 97), sponsored by Senator David Vitter, and H.R. 1321, sponsored by Representative Tammy Duckworth, would provide relief for first-time offenders.

Currently, the first offense under the PRA can generate substantial penalties for private businesses. S. 97 and H.R. 1321 would amend the PRA to provide relief against fines for first-time business offenders, "unless there is potential for serious harm to the public interest â€¦ or the violation presents a danger to the public health or safety."

However, Senator Vitter's bill currently has no cosponsors and Representative Duckworth's legislation has only five supporters, all of whom are in the minority. Thus, it appears unlikely that reform of the PRA will become law in 2013.

There are other legal vehicles in government that could disincentivize agencies from violating the PRA. EPA, for example, is bound by the "Equal Access to Justice Act" (EAJA), which provides financial compensation to groups that successfully challenge a regulation. As the Government Accountability Office noted, "EAJA thus allows payment of the attorney fees and other costs if the organizations sought review of a government action and prevailed."

Lawmakers could apply this concept to the PRA. If a business or individual challenges a collection that has lapsed or was obtained illegally, the agency would have to provide equitable compensation for the time and money spent during compliance. For example, if businesses did spend more than 262,000 hours complying with exchange regulations (noted above) and successfully challenged the illegal collection, HHS would be required to remit $13.1 million for its violation.

In sum, the list of reform measures to strengthen the PRA might be short, but the parade of violations is hardly brief. Agencies, especially HHS, routinely violate the law. Whether these offenses are willfully committed or innocently result from losing track of thousands of collections, lawmakers should examine agency motives and the nation's overall paperwork burden.

Weeding Out Regulatory Duplication

By Sam Batkins
May 30, 2013

An American Action Forum (AAF) review of more than 470 paperwork requirements finds there are 642 million hours of regulatory duplication, totaling 990 federal forms, and approximately $46 billion in costs. In other words, duplicative paperwork would require 321,000 employees working 2,000 hours annually to complete – more employees than Pittsburgh has residents. The massive regulatory regime continues to be cited as a major roadblock to economic and job growth and these areas of overlap make clear that there are opportunities for streamlining the current system.

Senator Tom Coburn and the Government Accountability Office (GAO) have conducted a similar analysis of wasteful, duplicative spending. In fiscal year 2013, the federal government will spend approximately $3.6 trillion, and Senator Coburn and GAO estimate roughly $95 billion in annual spending is duplicative.

To conduct this study, AAF replicated the same areas of overlap that GAO identified in its most recent report: "Actions Needed to Reduce Fragmentation, Overlap, and Duplication." AAF then searched for those program areas in OIRA's information collection review database, which displays literal red tape requirements.

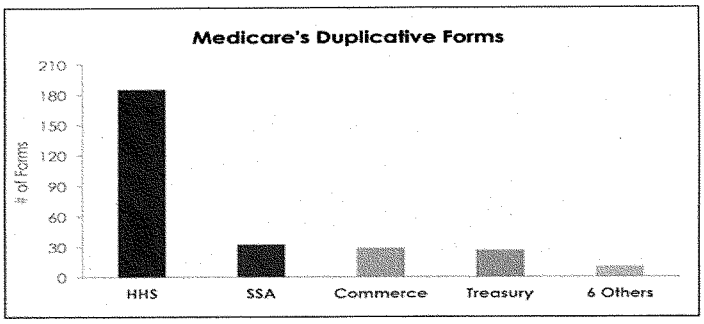
This search yielded 470 different paperwork requirements, covering everything from Medicare and Medicaid to catfish inspection. AAF examined regulatory overlap ("occurs when multiple agencies or programs have similar goals, engage in similar activities or strategies to achieve them"), fragmentation ("opportunities exist to improve service delivery"), and duplication ("two or more agencies are engaged in the same activities").

AAF recorded the paperwork collections associated with the areas of duplication, the number of agencies involved, the paperwork hours, and associated costs and forms. For many regulations, agencies declined to list a quantified cost burden with paperwork hours. However, the average cost for requirements that did quantify burdens was $73. When AAF applied that figure to collections without quantified cost data, the total burden of duplication jumped to $46 billion. A more central estimate, using BLS's average wage for a regulatory "compliance officer" ($31), yields a total cost of $20 billion for regulatory duplication.

Program	Agencies	Hours	Costs	Forms
Asset Forfeiture	2	6,945	$511,082	2
Catfish Inspection	3	2 million	$146 million	11
Crop Insurance	2	33 million	**$2 billion**	12
Drug Abuse Prevention	17	6 million	$297 million	122
Export Promotion	4	286,627	$18 million	67
Field-Based Information Sharing	2	384,766	$28 million	4
Higher Education Assistance	9	47 million	**$3 billion**	66
Homeland Security R & D	1	319,191	$23 million	46
Information Technology	11	319,466	$10 million	19
Medicaid	9	47 million	**$3 billion**	125
Medicare	10	486 million	**$36 billion**	281
Renewable Wind Energy	10	3 million	$177 million	96
Rural Water Infrastructure	2	1 million	$93 million	14
Tobacco	6	3 million	$176 million	101
Veterans Employment	4	12 million	$892 million	24
Totals: 642 million hours, $46 billion in costs, and 990 forms				

Medicare

GAO found two major areas of duplication and fragmentation within Medicare. AAF's results show ten different agencies handle Medicare forms, generating 486 million hours of paperwork, and a maddening 281 different forms. A high-end estimate of costs for this paperwork is $36 billion. One regulation, "Additional Quality Measures and Procedures for Hospital Reporting," imposes 6.7 million hours of paperwork and 21 different forms. The chart below displays the distribution of federal agencies and more than 280 different forms associated with Medicare.

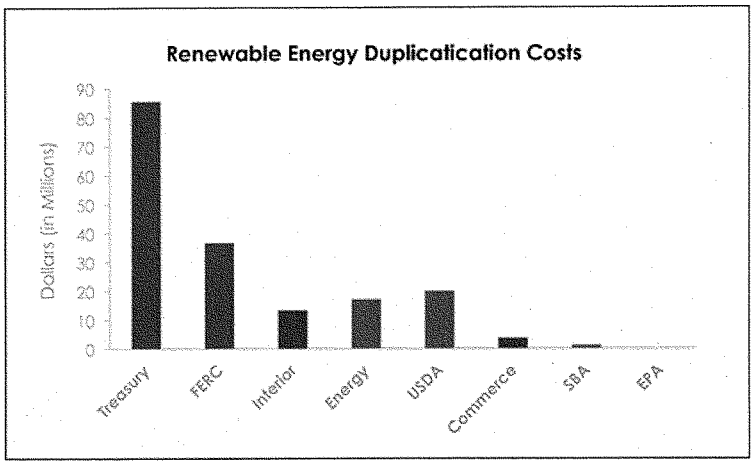


Renewable Energy

Not surprisingly, several different federal agencies regulate renewable energy. According to GAO, renewable energy programs significantly overlap, with dozens of agencies issuing hundreds of different initiatives.

The regulatory side of renewable energy is just as fragmented and duplicative. Ten agencies impose renewable energy paperwork, totaling 38 different collections of information. This duplication produces 2.7 million hours of paperwork, $177 million in costs, and 96 federal forms. For example, the "Repowering Assistance Program" contains 18 separate forms; the hours are modest (13,000), but there are obviously opportunities for simplification.

The costliest requirement for renewable energy on a per hour basis covers activities on the Outer Continental Shelf. The regulation produces 31,000 hours of paperwork, with an hourly cost of $122. The chart below displays the distribution of federal agencies imposing duplicative costs on renewable energy.

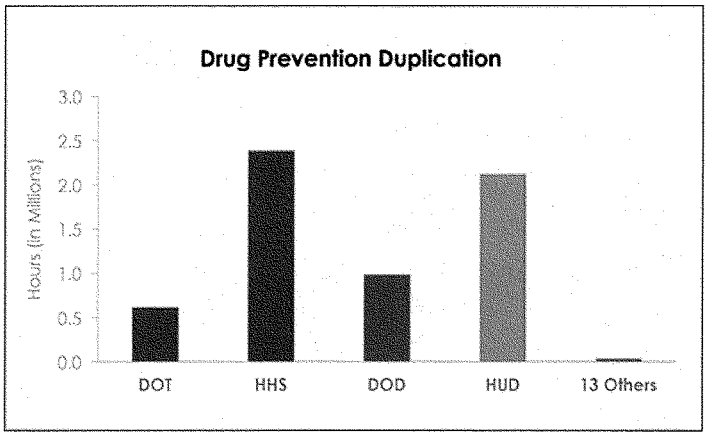


Duplication in Drug Abuse and Prevention

Drug Abuse and Prevention was also a duplicative program area that GAO and Senator Coburn identified. According to the GAO report, there are 76 federal drug abuse and prevention treatment programs. AAF's research revealed 41 separate information collections, spread among 17 different agencies. Combined, they generated 6.1 million hours of paperwork, almost $300 million in costs, and 122 forms.

For example, four different agencies within HHS administer drug abuse programs. The largest, "Mandatory Guidelines for Federal Workplace Drug Testing Programs," imposes 1.7 million hours of paperwork and 16 forms, but estimates an hour of paperwork at only $1.23.

The Department of Housing and Urban Development (HUD) handles the largest single drug abuse paperwork burden; HUD's "Screening and Eviction for Drug Abuse" imposes 2.1 million hours of paperwork. The chart below displays the distribution of federal agencies imposing duplicative drug prevention paperwork hours.



Conclusion

In his letter to the White House, Senator Coburn urged, "While we should be looking under every rock for ways to save, digging deep into agency budgets, the very *minimum* we should be doing is implementing reforms that are right in front of us." As with federal spending, regulatory duplication is a tired fact of life for businesses and individuals. Even many agencies acknowledge their regulatory burden should decline, but last year the federal government still added more than 355 million hours of paperwork. The President's Executive Order 13563 urged agencies to modify and streamline their regulations, but with 642 million hours of regulatory duplication, it is clear agencies can do much more.

PREPARED STATEMENT OF PEG SEMINARIO

Testimony of Peg Seminario, Director Safety and Health, AFL-CIO
Before the Subcommittee on Oversight, Federal Rights, and Agency Action
Senate Judiciary Committee
Hearing on
"Justice Delayed: The Human Cost of Regulatory Paralysis"
August 1, 2013

Chairman Blumenthal, Ranking Member Hatch and other members of the committee, thank you for the opportunity to testify today on the human costs of delays in regulatory protections.

My name is Peg Seminario. I am Director of Safety and Health for the AFL-CIO where I have worked for more than three decades on safety and health regulations and regulatory policy issues. During that time I have participated in dozens of rulemakings on important OSHA standards including rules to protect workers from asbestos, lead, hazardous chemicals and safety hazards like confined spaces. A benefit of my long tenure is that I have witnessed first-hand how these rules have made a difference, changing conditions and practices in workplaces, significantly reducing exposures, preventing injuries and illnesses and saving workers' lives.

At the same time, over the past 3 decades, I have seen the system and process for developing and issuing worker safety rules devolve from one that worked to produce needed rules in a relatively timely manner to the current broken and dysfunctional system which is failing to protect workers and costing workers' lives.

The Job Safety Law Has Saved Workers' Lives, but the Toll of Workplace Injury, Illness and Death Remains Enormous and Progress is Threatened

The Occupational Safety and Health Act of 1970 was enacted more than 40 years ago with the purpose and promise of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." Since that time, great progress has been made. The job fatal injury rate has been cut by more than 80 percent from 18 deaths per 100,000 workers to a rate of 3.5/100,000 workers according to the latest BLS statistics. Reported job injury rates have declined by 68 percent. This progress has been seen across all sectors of the economy, with the most hazardous industries, including construction, where regulatory and enforcement activities have been focused, experiencing the greatest reductions in fatality and injury rates. And while data on occupational diseases remains limited and inadequate, significant reductions in workplace exposures to hazards like asbestos, lead, benzene and bloodborne pathogens as a result of OSHA health rules, have been well documented.

Despite this progress, the toll of workplace injury, illness and death in the United States remains enormous. In 2011, the BLS reports that 4,693 workers were killed on the job and more than 3.8 million workers were injured. But research has shown that the BLS survey fails to capture many injuries due to limitations in the BLS survey and the

underreporting of injuries.[1,2] The real toll of job injuries is likely 2 to 3 times greater than the number reported – 7.6 million to 11.4 million a year. These data do not reflect the toll of occupational disease, which NIOSH and other health researchers estimate result in 50,000 deaths a year.

Some groups of workers, including Latino workers and immigrant workers, are at much greater risk of job fatalities and injuries because of their concentration in dangerous jobs and vulnerability to employer exploitation and retaliation. In 2011, according to BLS, there were 749 fatal injuries among Latino workers and 843 fatalities among immigrant workers, with both these groups experiencing fatality rates greater than the national average.

It is of great concern that after years of steady decline, for the past three years the job fatality rate for workers overall and for Latino workers has essentially been unchanged, as has the overall job injury rate, showing that greater efforts are needed if we are to make further progress in reducing job injuries and deaths.

The cost of job injury, illness and death is staggering. A 2012 study by Dr. J. Paul Leigh estimated the total annual cost at $250 billion a year, similar to estimates by the National Safety Council and the Liberty Mutual Safety Index when both direct and indirect costs are taken into account.[3] This does not include the cost of pain and suffering to workers and their families. This is similar to, or greater than, the cost of other common diseases including cancer, diabetes and coronary heart disease.

Workers' compensation, which is supposed to be the main source of payment for medical costs and wage replacement for workers who suffer job injuries and diseases, only covers a small proportion of the costs – less than 21 percent according to recent research. The vast majority of the costs are borne by workers themselves (50 percent) or society as a whole (29 percent), shifted to private health insurance, Medicare, Medicaid and Social Security Disability.[4]

Layers and Layers of Regulatory Requirements Have Crippled the Regulatory Process.

The OSHA law requires that health and safety standards be set to protect workers against significant risk of material impairment of health or loss of functional capacity to

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[1] Boden, L.I. and A. Ozonoff, "Capture-Recapture Estimates of Nonfatal Workplace Injuries and Illnesses," *Annals of Epidemiology*, Vol. 18, No. 6 (2008).
[2] Rosenman, K.D., Kalush, A., Reilly, M.J., Gardiner, J.C., Reeves, M. and Luo, Z., "How Much Work-Related Injury and Illness is Missed by the Current National Surveillance System?," *Journal of Occupational and Environmental Medicine*, Vol. 48, No. 4, pp. 357–367, April 2006.
[3] Leigh, J. Paul, "Economic Burden of Occupational Injury and Illness in the United States," *The Milbank Quarterly*, Vol. 89, No. 4, 2011.
[4] Leigh, J. Paul and James P. Marcin, "Workers' Compensation benefits and Shifting Cost for Occupational Injury and Illness," *Journal of Occupational and Environmental Medicine*, Vol. 54, No. 4, pp. 445-450, April 2012.

the extent that is technologically and economically feasible. Standards are to be based on the best available evidence, and established through an open, public process that goes well beyond the requirements of the Administrative Procedure Act. In addition to calling for public comments, the OSH Act requires that, upon request, a public hearing be conducted, where under OSHA regulations all interested parties have the opportunity to present testimony and ask questions of the agency and other witnesses. This process has produced good rules that have stood the test of time. Virtually all major OSHA standards have been subject to legal challenges, with the reviewing courts upholding most rules or ordering OSHA to make them stronger. The reviews of rules conducted independently or by the agency under Section 610 of the Regulatory Flexibility Act have found that rules were achieved at lower costs than estimated by the agency or industry, often leading to innovation and increased productivity.[5]

During the first decade of OSHA, promulgation of rules from start to finish took one to three years. Major rules were produced on asbestos, vinyl chloride, cotton dust, lead, and other hazards under both Republican and Democratic administrations. There were industry challenges and objections to most rules, but these objections were largely about how stringent the rule should be, not over the issue of whether regulation was needed at all.

But over the years, industry opposition to regulations increased. There were calls for more analyses and consideration of impacts of rules, particularly their costs, and more requirements were added to the rulemaking process through legislation, executive orders and other directives. Congress, the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Small Business Regulatory Enforcement Fairness (SBREFA) all imposed new requirements and restrictions on agency rules. SBREFA imposed special requirements on OSHA and EPA to subject rules with significant impacts to review by a small business panel even before the rule was proposed, adding months to the regulatory process.

From the Executive Branch, there were directives for more analysis, starting with executive orders requiring inflationary impact statements and economic impact statements during the Nixon and Ford administrations. These executive directives were expanded during the Reagan administration to require more comprehensive regulatory impact analyses and centralized review, which has continued, and currently operates under the requirements of Executive Order 12866, issued by President Clinton in 1993.

EO 12866 gives the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget the responsibility to oversee regulatory planning and review for the federal government. It calls for executive branch agencies to develop detailed analyses of the costs and benefits of economically significant rules, and to the extent permitted by law, adopt a regulation only upon a reasoned determination that the benefits justify the costs. EO 12866 also provides for OIRA to review all significant draft

[5] U.S. Office of Technology Assessment, *"Gauging Control Technology and Regulatory Impacts in Occupational Safety and health: An Appraisal of OSHA's Analytical Approach"*, OTE-ENV-635, Sept. 1995.

proposed and draft final rules to ensure compliance with the requirements of the order. The review is supposed to be completed within 90 days with the possibility of one 30 day extension at the request of an agency. Advance notices of proposed rulemaking or other preliminary regulatory actions may be reviewed, but only for a period of 10 working days.

The executive order includes some modest transparency measures, requiring a log to be kept of all meetings with outside parties along with the subject matter of discussions to be disclosed. It also requires that all documents exchanged between OIRA and the agencies, including changes in draft rules, to be made publicly available after the proposed or final rule has been published in the Federal Register.

But OIRA has routinely ignored the requirements of the executive order, second guessed agencies which have the authority and expertise to develop and issue rules, attempted to impose its judgment and held rules well beyond the maximum 120 day review period. During these lengthy reviews OIRA has welcomed and held many meetings with industry groups, both on draft proposed rules, when industry groups try to stop or weaken regulations, and then again when draft final rules are reviewed, giving opponents of rules yet another chance to try to delay, weaken or block needed rules.

It is important to point out that all of the communications with OIRA take place outside of the normal rulemaking process and are not subject to the terms of the Administrative Procedure Act, which governs rulemaking procedures for federal agencies. There is no record made of discussions that take place, nor any requirement that OIRA justify, based on evidence or fact, the positions it takes on agency rules. The process is one that is one sided - totally dominated by industry groups and regulated parties who have Washington representatives with ready access to the process. It is one of the worst forms of industry capture and corporate political dominance over our government. Citizens, including workers, who need these government protections simply have no voice.

We had hoped that with the Obama administration the OIRA review process would improve, and the authority for developing and issuing rules would be returned to the agencies where it belongs. Sadly, that has not been the case. Indeed, under the Obama administration, particularly since the 2010 mid-term elections with the election of an anti-regulatory Republican majority in the House of Representatives, the OIRA review process is the worst that I have seen under any administration. The dedicated and committed leaders and staff at OSHA and MSHA have been stymied in their efforts to issue long overdue and needed worker safety and health rules.

Since 2011, virtually every worker protection rule that has been submitted for OIRA review has been delayed. The MSHA proposed rule for proximity detection systems for mobile machinery for underground mines has been held by OIRA since September 2011, a final rule on protective equipment for power transmission that is supported by labor and industry has been held since June 2012, and a draft final rule to extend minimum wage and overtime requirements to domestic workers has been held since

January. The worst case is the delay in the review of OSHA's draft proposed silica standard, which has been held by OMB since February 2011 – for 2 and one half years.

There may be numerous reasons for the delays in these rules, including industry objections and intervention by other agencies and other White House offices. But the effect is the same – few rules are being issued to protect worker safety and health. Indeed, the record of the Obama administration in issuing needed OSHA rules is worse than the dismal record under the Bush administration, with the Obama administration issuing just 2 final major rules compared to 3 final rules issued by the Bush administration.

Delays in the Regulatory Process are Shameful and Harmful and Costing Workers' Lives

The result of all of the additional requirements for regulatory analyses and review is a regulatory process that is dysfunctional and paralyzed and results in needless and harmful delays in regulations. In my view, these additional requirements are not producing rules that are better or more effective than the process that was in place 30 to 40 years ago. The process substitutes questionable analyses for common sense, ignoring industry practice and public health recommendations that have traditionally been the basis for recommended safety and health guidelines and voluntary safety standards. It is certainly not producing rules in a timeframe that is efficient or protective for workers' safety and health.

In 2012, GAO conducted a study of the OSHA standard setting process. That review found that for major rules issued between 1981 – 2010 the average time for developing and issuing a major safety or health rule was about 8 years.[6] This average included rules that were mandated by Congress and issued as a result of litigation and court ordered deadlines, which took much less time.

Moreover, the GAO report only covered rules that had been completed. It does not reflect those rules which are stuck in the regulatory process, many of which are taking much longer than the eight year timeframe calculated by GAO. For example, it did not include the confined space entry rule for the construction industry that was promised by OSHA after a confined space rule to protect workers in general industry was put in place in 1993 - more than 20 years ago. This rule requires atmospheric testing and protective measures when workers are entering enclosed tanks and other confined spaces. A draft rule for confined space entry in construction underwent SBREFA review in 2003, and a proposal was issued in 2007. But the promulgation of the final confined space construction rule has been repeatedly delayed. The GAO report also did not include the OSHA silica rule, which OSHA first considered for rulemaking back in 1974. The present rulemaking on silica, discussed more fully below, began in 1997, more than 16 years ago. Today, there still is not even a proposed standard for this deadly workplace hazard.

[6] Workplace Safety and Health: Multiple Challenges Lengthen OSHA Standard Setting, GAO-12-330, April 2012, www.gao.gov/products/GAO-12-330.

The impact of these delays is inadequate protection for workers and leads to unnecessary deaths, injuries and illnesses. Here are three examples of how a broken system is costing workers their lives:

Cranes and Derricks

In 2002, in response to a 1999 recommendation of the Advisory Committee on Construction Safety and Health – a group comprised of labor, management and public representatives, OSHA initiated a rulemaking to update and strengthen its construction safety standard for cranes and derricks. Since there was broad agreement that a new standard was needed, OSHA proposed to develop the rule through a negotiated rulemaking process with representatives of major interested parties participating. After a year of intensive work, in July 2004, the negotiated rulemaking committee produced a recommended draft proposed standard that had unanimous support from labor, management, and public and government representatives. Despite this support, the rule was still subject to all the analytical and review requirements for significant safety and health rules. OSHA had to prepare a full economic analysis and the rule had to undergo review by a SBREFA panel to get input from small business entities before it could be proposed. The SBREFA review was completed in October 2006, after which activity on the rule came to a halt.

But then in 2008 a series of deadly crane accidents claimed a dozen lives. On March 15, 2008, a crane collapsed at a high-rise construction site in Manhattan- killing 4 people and injuring more than a dozen. Less than 2 weeks later, two workers died in a Miami crane collapse. In May, another New York City crane collapse killed 2 more workers, and in July of that year 4 workers were killed when a crane collapsed at a Houston, Texas refinery. In response to these disasters, the Bush administration finally proposed the rule in October 2008. But the final rule was not completed and issued until August 2010, more than 11 years after the recommendation of the OSHA construction advisory committee, eight years after the rulemaking was initiated and seven years after a negotiated rulemaking committee unanimously agreed upon the text of a rule.

It is inexcusable and shameful that even where there was broad agreement that the cranes and derricks standard was needed and about what the rule should require, that the regulatory system failed to protect workers. In this case, according to OSHA, during the eight year rulemaking, 176 workers died in crane accidents that would have been prevented if the crane and derricks standard had been in place.

Silica

Silica is a serious workplace health risk that causes the disabling and deadly lung disease silicosis. Its hazards have been recognized for centuries, and in 1991 it was determined to cause lung cancer. More than two million workers are exposed to silica,

with bricklayers, cement masons, road workers, sandblasters, foundry workers and glass workers among the workers at greatest risk from exposure to this deadly dust.

According to the National Center for Health Statistics, over the ten year period from 2001 to 2010, an average of 143 workers died each year from silicosis. Public health experts estimate that there are 3,600 to 7,300 new cases of silicosis occurring in the United States each year.

The current OSHA silica standards for general industry and construction adopted back in 1972 are out of date and fail to protect workers. The standards set permissible exposure limits based upon the percentage of quartz that is present and allow exposures of up to 100 – 200 ug/m^3. The construction standard is so out of date that the sampling equipment andtechnology that the standard is based on no longer even exist.

OSHA first started working on a new silica standard in 1974, nearly 40 years ago, after NIOSH recommended that permissible exposure be reduced to 50 ug/m^3 to protect workers from silicosis. The current rulemaking on silica began in 1997. In 2003, the Bush administration designated the silica standard as a high priority for regulatory action and in that same year draft silica standards for general industry and construction underwent SBREFA review, which concluded in December 2003. Then progress came to a complete halt for the remainder of the Bush administration.

When the Obama administration took office in 2009, the AFL-CIO was hopeful that the OSHA silica standard and other needed rules that were also long overdue would move forward. And for two years, that was indeed the case. The required risk assessments and peer reviews for the silica rule were completed and in February 2011, the draft proposed silica standard was sent to OMB for review under Executive Order 12866.

Now two and a half years later the draft proposed rule is still being held by OMB in clear violation of the executive order which limits the time for review to no more than 120 days.

It is worth noting that the OMB review of the silica proposed rule coincided with the commencement of the 112th Congress when Republicans took control of the House of Representatives with regulatory reform and rollbacks at the top of their agenda. In response to their attacks and business opposition, the regulatory process, particularly for worker protection regulations, came to a halt. Despite objections and appeals from unions, workers, the public health community, members of Congress and others, there has been no movement. The only response from OMB and the Obama administration during the past two and one half years has been that the issue is "complicated."

We strongly disagree. As noted earlier, silica is a well recognized health hazard to which millions of workers are exposed. It causes a disabling deadly lung disease and lung cancer. The control measures are simple – water to suppress dust, and ventilation to capture it and prevent the dust from entering the environment. Both of these control measures are widely available with many construction tools fitted with these dust

controls. But except in California and New Jersey, which have mandated such silica dust controls, there is no requirement that they be used and workers continue to be exposed to this deadly dust.

This failure to regulate silica has allowed uncontrolled exposures and more unnecessary disease and death. According to OSHA's preliminary risk assessment prepared for the 2003 SBFREA review, a new silica standard of 50 ug/m^3 would prevent 60 silicosis and lung cancer deaths a year. This translates into 150 deaths that could have been prevented since the draft proposed silica standard was sent to OMB, 960 deaths since the rulemaking began in 1997, and more than 2,300 deaths since OSHA first looked to tighten silica regulations.

In recent weeks there have been some indications that the silica rule may be released by OMB soon, with OSHA Assistant Secretary David Michaels announcing that the rule would be issued this summer. We hope that is the case.

But the rule is just a proposal, and with its release the public process of comments and hearings will begin. Workers, unions and other interested parties will finally have the opportunity to present their views on this important protection. But the rule will have no effect and impact unless and until it is finalized, a process that will still take years. This will only be possible if the Obama administration decides that protecting workers from deadly silica dust is a priority and commits to completing the regulation before the end of its second term.

Combustible Dust

A combustible dust rule to prevent explosions from the accumulation of dust in factories, mills and storage facilities has been a high priority for unions for years. In 1987, OSHA issued a grain dust standard which significantly reduced grain elevator explosions. But there are no similar requirements for other dusts from food products, metals, wood and chemicals- all of which can be highly explosive. From 1995 to 2003, there were a series of massive dust explosions that killed 28 workers and injured 169. In response to these explosions, the U.S. Chemical Safety Board undertook a nationwide study of combustible dust hazards, and, in 2006, issued a study and recommended that OSHA develop and issue a combustible dust standard. The Bush administration failed to initiate rulemaking and, instead, in October 2007, launched a National Emphasis Enforcement Program. Four months later, in February 2008, there was a massive dust explosion at the Imperial Sugar Refinery in Port Wentworth, Georgia that killed 14 workers and injured 38.

Following the explosion, labor unions petitioned Secretary of Labor Elaine Chao to issue an emergency temporary standard for combustible dust, which OSHA has the authority to do under Section 6(c) of the OSH Act. In May 2008, the House of Representatives passed legislation mandating that OSHA issue a combustible dust rule.

OSHA declined to issue an emergency standard and, instead, in October 2009, issued an advance notice of proposed rulemaking requesting information and, in late 2009 and early 2010, held stakeholder meetings to get input on a possible combustible dust rule. In the Spring of 2010, OSHA announced in its Regulatory Agenda it would initiate the required SBREFA small business review process on a combustible dust rule in April 2011. But after the 2010 mid-term elections, plans changed and the review was not initiated. In the Fall 2011 Regulatory Agenda, the combustible dust rule was relegated to the long-term agenda with the next action "undetermined."

While the combustible dust standard has languished, the explosions deaths and injuries have continued. In January 2011, there was a deadly combustible dust explosion at the Hoegannaes Corporation, a metal powder plant in Gallitin, Tennessee, which killed two workers. One of those workers killed was Wiley Shelburne, a 42 year old electrician at the plant. On January 31, 2011, he was called to check out a malfunctioning bucket elevator that carries dust through the plant. When the machine restarted, it knocked dust into the air which was ignited by exposed wires, causing a massive explosion. Wiley Shelburne was burned over 95 percent of his body and died two days later.

Four months later, there was another explosion at the same Hoegannaes plant. This explosion killed 3 workers and injured 2 more.

In response to these explosions and continued oversight, OSHA is again moving forward on the combustible dust rule. The latest regulatory agenda, issued in July, indicates that OSHA plans to start the SBREFA review process of a draft proposed rule in November 2013. But there is still no guarantee that OMB, which also oversees the SBREFA process, will allow this to occur.

Just last week, the U.S. Chemical Safety Board designated the OSHA combustible dust standard as a most wanted safety improvement – the first such designation in that agency's history. Hopefully this designation will help move this rule forward. But without a legislatively or court imposed timeline, it will still be many years before this rule is completed. In the meantime, workers will continue to be needlessly killed and injured in combustible dust explosions.

Pending Regulatory Reform Legislation Would Make it Virtually Impossible to Issue Needed Worker Safety Protections

Numerous bills have been introduced in the Senate and House to "reform" the regulatory process. All of these measures would bring standard setting for worker safety to a grinding halt and make it impossible for OSHA to issue needed worker safety and health protections. The Regulation from the Executive in Need of Scrutiny Act (REINS Act) – S. 14, H.R. 367, which the House is set to vote on this week, would require both houses of Congress to approve every major rule within a 70 day time period. If Congress failed to act, the rule would be null and void.

The Regulatory Accountability Act (RAA) - S. 1029, H.R. 2122- would override the Occupational Safety and Health Act, the Clean Air Act and other laws, and make costs and impacts on business, not protecting health and safety, the primary consideration in setting rules. It would also add additional requirements for regulatory analysis and risk assessment and give opponents of regulations more opportunities to object to and challenge rules. This year, the RAA includes a new provision that would impose a 2 year expiration date on all rulemakings, with the possibility of a one year extension. Standards not finalized within 2 – 3 years of the issuance of the proposed rule would be null and void, with the agency required to start the process from scratch all over again in order to proceed. The 2012 GAO review of OSHA standard setting found that the average time from proposed to final rule was 39 months for OSHA rules issued between 1981 and 2010. Very few rules were completed within 3 years of the proposal, and under the terms of the RAA would never have been completed.

Other bills which would add more analytical and review requirements, delaying the issuance of needed rules, include the Regulatory Flexibility Improvement Act (H.R. 2542), and the Independent Agency Regulatory Analysis Act (S. 1173).

What Can Be Done to Fix the Broken Regulatory Process?

It's taken more than 30 years to create the dysfunctional regulatory system that we have today. Fixing the process will not be easy or quick. But there are some things that can and should be done to improve the process and speed up the promulgation of needed rules.

The first order of business is to do no more harm. Most of the regulatory reform proposals that have been introduced in this Congress would further delay or cripple the promulgation of needed rules. These proposals should be opposed and rejected.

Second, there must be a renewed commitment, both from the Congress and from the administration, to implement the laws that have been enacted. Protecting the safety and health of workers and the public must be a priority. Without political leadership and support for needed rules, corporate opposition coupled with the quagmire that is the regulatory process will make it impossible to complete and issue these safeguards.

Congress must hold agencies and OIRA accountable for their failure to act. This can be done through ongoing monitoring and oversight, demands for timetables and action on rules and justification when deadlines are missed. Publicly highlighting the delays in rules and holding agencies accountable can help force action. Senator Blumenthal, the letter that you and other members of Congress sent to new OMB head Sylvia Mathews Burwell on the excessive delays in rules has certainly gotten OIRA's attention. Hearings like the one today will also help send a message that the current system and current delays in rules are unacceptable.

If oversight does not produce action, Congress should introduce and enact legislation that mandates action on specific rules. Such legislation was enacted for OSHA's

standards on bloodborne pathogens, lead in construction, and needlesticks and should be utilized again to ensure the adoption of priority rules.

Congress through the appropriate committees should also conduct a comprehensive review of the existing regulatory system, all the requirements that have been added through legislation and executive action, the costs and feasibility of meeting these requirements and whether these requirements have added any worthwhile benefit to improving regulations or have simply served to delay and thwart the issuance of rules. To my knowledge, over the many decades that requirements have been added to the regulatory process, there has never been a thorough evaluation of the usefulness of these measures and the impact of these requirements on the ability of government agencies to do their jobs. If requirements are found to be of minimal or no value for the burden they impose, they should be eliminated or reduced.

Congress should look to ways that the regulatory process can be streamlined. Where there is broad agreement on rules or rules are adopting existing practices that are well accepted and in place, requirements for regulatory analyses and review should be reduced.

Congress should provide adequate funding to the agencies to develop sound rules and to conduct the required analyses. All of the additional regulatory analysis and review requirements have been added without regard to their costs and without accompanying funding to meet these requirements. Agencies have fewer and fewer resources to meet greater responsibilities and growing obligations.

In the executive branch, OIRA must respect the authority and expertise of agencies and not attempt to substitute its judgment or policy views. Executive Order 12866 should be amended to allow agencies to proceed with rules if OMB fails to conclude its review within the required timeframe. The EO should provide for much greater transparency of the review of rules. It should not allow, and in fact should prohibit, meetings of OIRA with outside parties to prevent industry dominance and undue influence over the regulatory process. For communications between executive branch agencies, the order should mandate greater transparency and should require a public docketing by OIRA and agencies of all communications and notations of all changes made in rules during the review process.

In conclusion, the regulatory process is broken and dysfunctional. It is failing to protect workers and the public, with delays costing lives, limbs and health. It's time for the Congress and the executive branch to fix this broken system and work for a regulatory process that serves the workers' and the publics' good.

PREPARED STATEMENT OF DR. PATRICK MCLAUGHLIN

MERCATUS CENTER
George Mason University

Bridging the gap between academic ideas and real-world problems

TESTIMONY

ON THE HUMAN COSTS OF THE US REGULATORY SYSTEM: SHOULD CONGRESS PRESSURE AGENCIES TO MAKE RULES FASTER?

BY PATRICK A. MCLAUGHLIN

Senate Judiciary Committee
Subcommittee on Oversight, Federal Rights, and Agency Action

August 1, 2013

INTRODUCTION

Chairman Blumenthal, Ranking Member Hatch, and members of the committee, thank you for inviting me to testify today. I am an economist and senior research fellow at the Mercatus Center at George Mason University, a 501(c)(3) research, educational, and outreach organization in Arlington, Virginia. My primary research focuses on the regulatory process and how it could be improved, so I am delighted to testify on today's topic.

The political system in the United States typically reacts to major events—perceived crises, new technologies, accountings scandals, and the like—by creating new regulatory agencies and new regulations. The Patient Protection and Affordable Care Act (PPACA), enacted in 2010 as a congressional response to shortcomings of the medical care and insurance system in the United States, is a recent example of such a response. In the sense that PPACA has and will continue to cause the creation of new regulations, it is no different than any other act of Congress prescribing goals and duties to regulatory agencies. Conversely, there is no mechanism built into the regulatory system for the removal of obsolete, inefficient, redundant, or otherwise undesirable regulations. The result is a constant accumulation of federal regulations. As the quantity and scope of regulations grow, so does the degree to which they affect the economy. In 2012, the *Code of Federal Regulations*—the series of books that contains all regulations in effect at the time of printing—contained over 170 thousand pages of dense legal text with over one million restrictions, the result of the accumulation of regulations over decades and decades of reactive governance.[1]

PPACA directs a multitude of executive branch agencies to add to this enormous body of regulations. The final version of PPACA, as published in the *United States Statutes at Large*, was 906 pages long, a length that attests

1. For pages, see Office of the Federal Register, *Federal Register Document Pages 1976–2012*, https://www.federalregister.gov/uploads/2013/05/OFR-STATISTICS-CHARTS-ALL1-1-1.pdf. For restrictions, see Omar Al-Ubaydli and Patrick McLaughlin, "RegData: A Numerical Database on Industry-Specific Regulations for All US Industries and Federal Regulations, 1997–2010" (Working Paper No. 12-20, Mercatus Center at George Mason University, Arlington, VA, October 2012), http://mercatus.org/publication/industry-specific-regulatory-constraint-database-ircd. RegData is also available online at http://regdata.mercatus.org.

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to the fact that PPACA will lead to the creation of a potentially monumental quantity of new regulation. As such, it is appropriate to consider both the overall consequences of making that many new rules and whether those consequences might affect lower-, middle-, and high-income households differently. One focus of this hearing, according to the invitation letter I received from Chairman Blumenthal, is the human costs of rulemaking delay. I applaud the committee's concern over how the often obscure regulatory process can lead to real human costs—costs measured not just in dollars, but also in human lives.

The regulatory process in the United States creates human costs in more ways than can be covered in this testimony, but I will cover three:

1. The accumulation of regulations stifles innovation and entrepreneurship and reduces efficiency. This slows economic growth, and over time, the decreased economic growth attributable to regulatory accumulation has significantly reduced real household income.

2. The unintended consequences of regulations are particularly detrimental to low-income households—resulting in costs to precisely the same group that has the fewest resources to deal with them.

3. The quality of regulations matters. The incentive structure of regulatory agencies, coupled with occasional pressure from external forces such as Congress, can cause regulations to favor particular stakeholder groups or to create regulations for which the costs exceed the benefits. In some cases, because of statutory deadlines and other pressures, agencies may rush regulations through the crafting process. That can lead to poor execution: rushed regulations are, on average, more poorly considered, which can lead to greater costs and unintended consequences.[2] Even worse, the regulation's intended benefits may not be achieved despite incurring very real human costs.

Every regulation ostensibly has a goal, and there are always different ways to achieve it. There are also always costs and often unintended consequences. Careful consideration of regulatory options can help minimize the costs and unintended consequences that regulations necessarily incur. If additional time can improve regulations in this regard, then additional time should be taken.

REGULATORY ACCUMULATION

By design, regulations restrict choices. In its most basic definition, a regulation is a law that "seeks to change *behavior* in order to produce desired *outcomes*," and it does this by requiring or forbidding certain actions.[3] Federal regulations can place restrictions on the choices of individuals, large manufacturers, high-tech startups, small business owners, state and local governments, and even on the federal government itself.

Federal regulation in the United States has consistently grown for decades. One way to measure the growth of federal regulation is to count the number of pages published each year in the *Code of Federal Regulations*. The *Code of Federal Regulations* contains the legal text of all federal regulations in effect each year. That means one can simply look at the number of pages published in the *Code of Federal Regulations* in a given year to get a rough approximation of the extent and complexity of all federal regulations in effect in that year. Figure 1 shows the number of pages published in the *Code of Federal Regulations* each year from 1975 to 2012.

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2. Jerry Ellig, Patrick A. McLaughlin, and John F. Morrall III, "Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis across U.S. Administrations," *Regulation & Governance* 7 (2013): 153–73; Jerry Ellig and Rosemarie Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis" (Working Paper No. 13-13, Mercatus Center at George Mason University, Arlington, VA, July 2013), http://mercatus.org/publication/regulatory-process-regulatory-reform-and-quality-regulatory-impact-analysis.
3. Cary Coglianese, "Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy" (Expert Paper No. 1, Organisation for Economic Co-operation and Development, August 2012), http://www1.oecd.org/regreform/regulatory-policy/1_coglianese%20web.pdf.

Figure 1: Total Number of Pages in the Code of Federal Regulations 1975 -- 2011

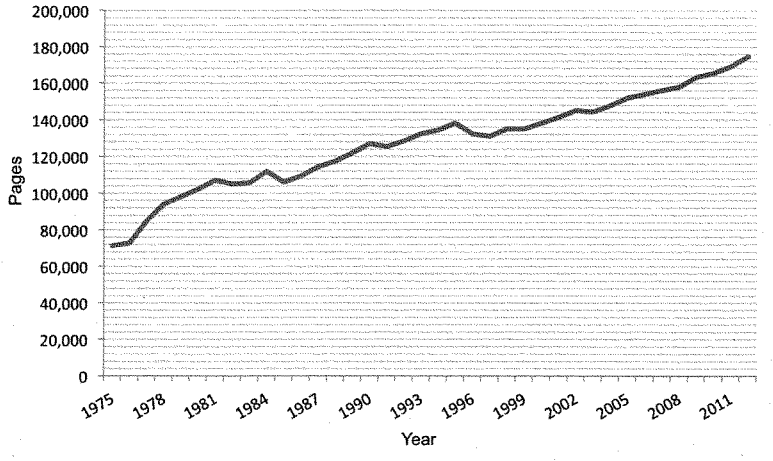
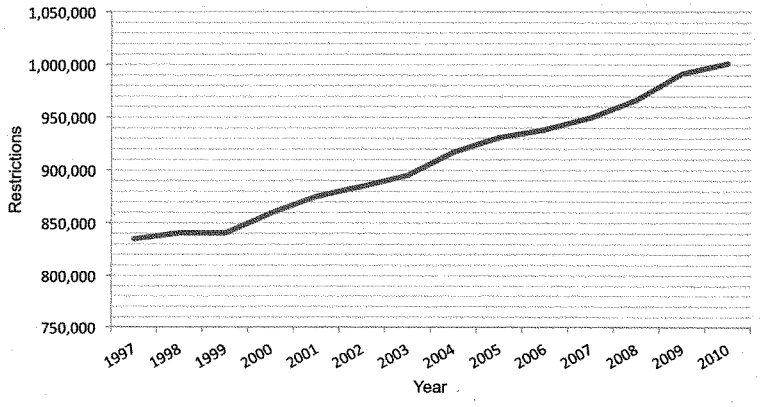


Figure 2: Total Number of Restrictions 1997 – 2010



As Figure 1 shows, the number of pages published in the *Code of Federal Regulations* has consistently grown over the tenures of all recent presidents. In 1975, there were 71,224 pages of regulation. In 2012, 174,545 pages of regulation were published.[4]

4. Office of the Federal Register, *Federal Register Document Pages*.

Of course, not all pages are the same. Another way to assess the extent and complexity of federal regulation is to look at the actual number of restrictions—words that create binding, legal obligations either to do something or not to do something, such as "shall," "must," and "may not." This permits a more narrow focus on the components of regulatory text that are truly restrictive, as opposed to, for example, text that merely provides information or opinion. In a project called RegData, made publicly available on the website of the Mercatus Center at George Mason University, economics professor Omar Al-Ubaydli and I have done exactly that.[5] Figure 2 shows the total number of regulatory restrictions published in regulatory text in the *Code of Federal Regulations* from 1997 to 2010.

Figure 2 corroborates the impression given by Figure 1: regulation has been consistently growing. Aside from helping people like me to make nifty graphs and figures, these measures of regulation allow economists to perform studies on the consequences of the accumulation of regulation.

THE CONSEQUENCES OF REGULATORY ACCUMULATION

The buildup of regulations has economic consequences. When regulations are created in reaction to major events,

> new rules are [placed] on top of existing reporting, accounting, and underwriting requirements. . . . For each new regulation added to the existing pile, there is a greater possibility for interaction, for inefficient company resource allocation, and for reduced ability to invest in innovation. The negative effect on U.S. industry of regulatory accumulation actually compounds on itself for every additional regulation added to the pile.[6]

In all cases, regulatory intervention in the market is costly. According to the Office of Management and Budget, the cost of compliance with federal regulations alone—that is, the cost that regulations directly impose on regulated entities—likely totals in the tens of billions of dollars annually.[7] A simple example of direct compliance costs is the fee regulated professionals, such as stockbrokers, must pay to obtain licenses when those licenses are required by regulations.[8] But some compliance costs are surprising. For example, restaurants sometimes must pay to have food inspectors perform inspections in the evening, when the restaurant is open, instead of during the day when food inspectors typically work.[9]

In addition to money outlays to pay compliance costs, regulation necessarily creates what economists call "opportunity costs"—productive activity forgone because scarce resources get devoted to regulatory compliance. If a restaurant owner has to spend an evening showing the food inspector around, the owner cannot spend that same time greeting customers and ensuring that they have a quality dining experience.

More subtle, perhaps, is the fact that the accumulation of restrictions over time leaves individuals in the economy less liberty to entrepreneurially seize an opportunity, less control over the use of their own resources, and less ability to innovate. This means would-be entrepreneurs are sometimes prohibited from creating a new product

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5. Al-Ubaydli and McLaughlin, "RegData: A Numerical Database," and RegData, Mercatus Center at George Mason University, accessed July 29, 2013, http://regdata.mercatus.org.
6. Michael Mandel and Diana Carew, "Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform" (Progressive Policy Institute, Washington, DC, 2013), 3–4.
7. Office of Management and Budget, Executive Office of the President, "Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities" (2012), http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf.
8. FINRA requires "General Securities Representatives" to pass a Series 7 exam. See FINRA, "FINRA Registration and Examination Requirements," last modified February 18, 2013, http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/Qualifications/P011051.
9. See Lea Richards, "Regulation Nightmares," *CNN Money*, September 22, 2011, http://money.cnn.com/galleries/2011/smallbusiness/1109/gallery.regulation_nightmares/4.html.

that could potentially improve consumers' quality of life or even save lives. For example, the National Highway Traffic Safety Administration (NHTSA) has regulations restricting how headlights on cars can be designed. While those NHTSA regulations allow headlights to automatically switch between high and low beam and swivel to shine light around a curve in the road, they do not allow designers to implement any sort of adaptive setting that could dim the high beam only at the appropriate spots in the road. One major reason why cars have low beams is so that drivers can switch to low beams when another car is approaching. Without switching from high beams, the oncoming driver can be temporarily blinded. Of course, there are still other potential hazards, obstacles, and people on other parts of the road. While switching to low beams has the benefit of not blinding the oncoming driver, it has the cost of reducing visibility, particularly on the sides of the road. Toyota, Mercedes, and Audi have all created systems that dim only a select portion of the high beam when another car is approaching. This selective dimming allows the driver to still see the sides of the road, where pedestrians may be walking, while simultaneously keeping her high beams from blinding oncoming drivers. While these systems have been built and sold in Europe and Asia, they cannot be sold in the United States because of NHTSA regulations.[10] The implied human cost is obvious: human lives could be lost—pedestrians who may have been seen with high beams but not low beams—because of the intransigence of the regulatory system.

Regulations like these have been accumulating at a fairly constant rate for more than half a century. As regulations accumulate and block off entrepreneurial choices and potential innovations, the economy suffers. Sustained economic growth depends on innovation and entrepreneurship. A recent study published in the *Journal of Economic Growth* added to the already substantial evidence supporting the point that regulatory accumulation slows economic growth by stifling innovation and entrepreneurship.[11] Using pages from the *Code of Federal Regulations* as its measure of the extent and complexity of federal regulations, this study found that between 1949 and 2005 the accumulation of federal regulations has slowed economic growth by an average of 2 percent per year. Considering that economic growth is an exponential process, an average reduction of 2 percent over 57 years makes a big difference. A relevant excerpt tells just how big of a difference:

> We can convert the reduction in output caused by regulation to more tangible terms by computing the dollar value of the loss involved. [...] In 2011, nominal GDP was $15.1 trillion. Had regulation remained at its 1949 level, current GDP would have been about $53.9 trillion, an increase of $38.8 trillion. With about 140 million households and 300 million people, an annual loss of $38.8 trillion converts to about $277,100 per household and $129,300 per person.[12]

That's $277,100 per household in real goods, including health care, that were not produced and consumed because of federal regulation. That number seems almost too high to be believed, but, in fact, it is not out of line with a number of other studies that have been produced by such organizations as the World Bank and the OECD, as well as other scholars.[13]

To make more sense of it, consider retirement savings. People save for retirement by investing money in the present, in the hope that those investments will grow fast enough to allow a more comfortable retirement. So consider a case where your invested retirement savings grew two percent more slowly each year. How much less would you have when you retire? Invested retirement savings, like the economy, follow an exponential growth path. This means that rate of growth in one year affects all future years. If you tuck away $10,000 today, and your investments

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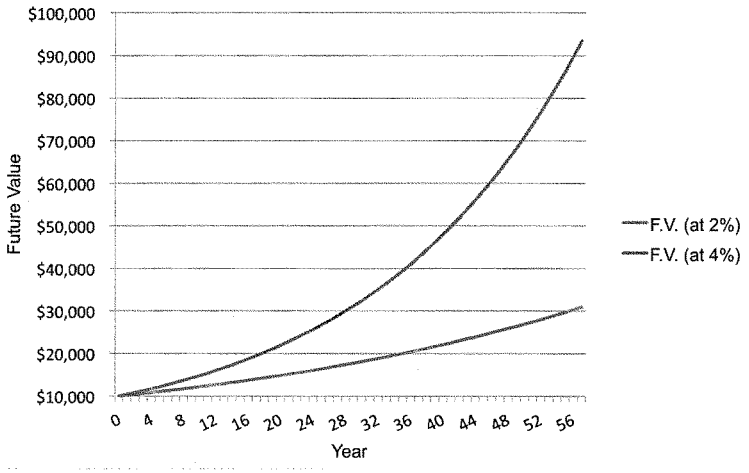
10. Gabe Nelson, "Toyota Puts High Beams on Headlight Regulation," *Automotive News*, May 13, 2013, http://www.autonews.com/article/20130513/OEM11/305139967#axzz2a4R2r6ou.
11. John W. Dawson and John J. Seater, "Federal Regulation and Aggregate Economic Growth," *Journal of Economic Growth* (2010): 1–41.
12. Ibid., p. 22.
13. For examples, see Norman Loayza, Ana Maria Oviedo, and Luis Serven, "The Impact of Regulation on Growth and Informality: Cross-Country Evidence" (Related Publications 05-11, AEI-Brookings Joint Center for Regulatory Studies, 2005); Simeon Djankov, Caralee McLiesh, and Rita Maria Ramalho, "Regulation and Growth," *Economics Letters* 92.3 (2006): 395–401; Guiseppe Nicoletti et al., "Product and Labor Markets Interactions in OECD Countries" (Economics Department Working Paper No. 312, OECD, Paris, 2001); Giuseppe Nicoletti and Stefano Scarpetta, "Regulation, Productivity and Growth: OECD Evidence," *Economic Policy* 18, no. 36 (2003): 9–72; Alberto Alesina et al., "Regulation and Investment," *Journal of the European Economic Association* 3, no. 4 (2005): 791–825.

return 5 percent over the course of the next year, that means that you would have $10,500 next year. If that $10,500 returns 5 percent again in the following year, you would have $11,025. On the other hand, if that $10,000 returned only 3 percent in the first year, you would have $10,300 at the end of that year. And if you received 3 percent again in the second year, at the end of the second year, you would have $10,609.

Over the course of 57 years, a difference of 2 percent in the rate of growth leads to a substantial difference in outcomes. Figure 3 shows two growth paths for a sum of $10,000 over a 57-year period—one path growing at 2 percent per year, and the other at 4 percent per year. After 57 years, that initial $10,000 becomes more than $93,500 when growing at a 4 percent annual rate. When slowed to an annual 2 percent growth rate, that $10,000 grows to only about $31,000 over the same period.

Figure 3: Growth Rate of Initial Investment over 57 Years



The economy grows in a similar way, following an exponential growth path. Goods, such as computers and machinery, that are produced in one year in the economy contribute to economic growth in the following year. Once that fact is realized, it is easier to understand how a 2 percent difference in economic growth can lead to households being $277,100 poorer because of federal regulation.

Nonetheless, my points do not require you to believe that the total costs of federal regulation are that high. It is more important to understand the mechanisms that cause the accumulation of federal regulation to be costly. What exactly is it about regulatory accumulation that causes economic growth to slow?

Two lynchpins of economic growth—innovation and competition—can be negatively affected by regulations. Although even the best-crafted regulation can inhibit innovation, there is substantial evidence that inflexible regulations, like design standards requiring only high and low beam headlights and nothing in between, stifle innovation. For example, regulations that impose specific technologies—such as catalytic converters in vehicle exhaust systems or scrubbers in the smokestacks of power plants—offer no incentive or ability for companies to find alternative solutions that could achieve the same objective as the required technology.[14] Conversely, incentive-based

14. Robert Hahn and Robert Stavins, "Incentive-Based Environmental Regulation: A New Era from an Old Idea," *Ecology Law Quarterly* 18 (1991): 1–42.

regulations, such as regulatory systems that create permits that are tradable in a market, or that set a performance standard without specifying a design or technology that must be used to achieve that performance standard, allow regulators to achieve an objective at lower cost. Of course, the fact that a regulatory program contains market-based incentives does not guarantee success in achieving desired outcomes. As one study on the topic of incentive-based regulation put it, "whether any specific instrument is desirable depends on how it is designed and implemented."[15] Incentive-based regulations as a general rule do less harm to innovation than inflexible, command-and-control regulations, but even the best design cannot entirely mitigate a regulation's consequences on innovation.

A recent study by economist Matt Mitchell (which I have attached) points out that regulations are sometimes used to grant privileges to favored companies, primarily by shielding them from competition.[16] As examples, Mitchell notes that thirty-six states "require government permission to open or expand a health care facility," and thirty-nine states "require government permission to set up shop as a hair braider." When regulations make it harder for entrepreneurs to establish a particular type of business, incumbents in that line of business can charge higher prices or provide lower-quality products—they have less to fear from competitors because of the shield of regulation. Thus regulations sometimes serve to entrench incumbents and limit competition, to the detriment of economic growth.[17] Protection from competition also serves to limit innovation. One study found that the companies that spent the most resources lobbying Congress and agencies for protective treatment tended to be "larger, older, less diversified, and less profitable" than those companies that did not lobby.[18] Indeed, when there is a possibility of gaining protection from the government through lobbying efforts, some companies will divert scarce resources to doing so—necessarily decreasing the resources those companies can use for research and development, employee training, and other innovations that increase productivity.[19]

REGRESSIVE EFFECTS OF REGULATIONS

Regulations can be regressive, particularly in their effects on prices.[20] A regressive regulation is one whose burden disproportionately falls on lower-income individuals and households. When regulations force producers to use more expensive production processes or inputs, some of those production-cost increases are passed along to consumers in the form of higher prices. For example, in 2005 the Food and Drug Administration banned the use of chlorofluorocarbons as propellants in medical inhalers, such as the inhalers millions of Americans use to treat asthma.[21] Since the implementation of that ban, the average price of asthma inhalers has tripled.[22] To individuals with high incomes, the tripling of the price of inhalers may not have even registered. But to people with low incomes, the higher price may lead to the choice to not buy an inhaler and instead leave the asthma untreated—potentially leading to a real human cost if the person suffers an asthma attack without an inhaler available.

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15. Robert W. Hahn and Robert N. Stavins, "Economic Incentives for Environmental Protection: Integrating Theory and Practice," *American Economic Review* 82, no. 2 (1992): 464–68.
16. Matthew Mitchell, "The Pathology of Privilege: The Economic Consequences of Government Favoritism" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, July 9, 2012), http://mercatus.org/publication/pathology-privilege-economic-consequences-government-favoritism.
17. Mitchell, "Pathology of Privilege," 2012, 19–21.
18. Stefanie Randall Morck Lenway and Bernard Yeung, "Rent Seeking, Protectionism and Innovation in the American Steel Industry," *The Economic Journal* 106 (1996): 410–421, 410.
19. Chung-Lei Yang, "Rent Seeking, Technology Commitment, and Economic Development," *Journal of Institutional and Theoretical Economics* 154, no. 4 (1998): 640–658.
20. Diana Thomas, "Regressive Effects of Regulation" (Working Paper No. 12-35, Mercatus Center at George Mason University, November 2012), http://mercatus.org/publication/regressive-effects-regulation.
21. Use of Ozone-Depleting Substances, 70 Fed. Reg. 63 (April 4, 2005), 17168, http://www.fda.gov/OHRMS/DOCKETS/98fr/05-6599.pdf.
22. Laurie Tarkan, "Rough Transition to New Asthma Inhalers," *New York Times*, May 13, 2008, http://www.nytimes.com/2008/05/13/health/13asth.html?_r=0.

When regulations cause the prices of goods and services to increase, lower-income households may elect not to buy those goods anymore or may have to decrease the amounts of other goods they buy in order to afford the more expensive, regulated good. This can have the unintended consequence of forcing lower-income families not to purchase some good or service that was a medical necessity or that would have reduced the risk of accidental death. I have attached a recent study by economist Diana Thomas that gives more details on the regressive effects of regulations.

REGULATORY CHOICES MATTER

The specific choices made in the execution of a regulation can dramatically impact both whether a regulation accomplishes its objective and how much the regulation costs the economy. As a society, we are often willing to sacrifice some economic growth in exchange for regulations if it can address an otherwise unfixable problem. How a regulation attempts to achieve that goal plays a huge role in determining the regulation's costs and consequences. It takes time to discern what option can yield the most "bang for the buck," and picking the wrong approach risks sacrificing a lot—both in economic costs and in human costs—in order to gain nothing.

There are always multiple ways to design a regulation. This is why every administration for the past four decades has required some form of economic analysis of regulations prior to their implementation. Among other things, a good economic analysis of a regulation first determines whether there is actual evidence that some otherwise unfixable problem exists, and then weighs the pros and cons of various approaches to fixing that problem. As you likely know, these analyses are performed by regulatory agencies and are called regulatory impact analyses for economically significant rules.

Several years ago, a colleague and I launched a project at the Mercatus Center at George Mason University called the Regulatory Report Card that systematically rates the quality of those analyses.[23] The Regulatory Report Card now includes information on how well regulatory analyses were performed for over one hundred economically significant proposed regulations, spanning 2008 to 2013. Using the data from that project, scholars have been able to learn some best and worst practices observed in these economic analyses, as well as test whether certain factors, such as statutory deadlines, seem to affect quality.

Some lessons that are relevant to this hearing:

1. Statutory deadlines are associated with lower-quality regulatory analyses.[24]

2. The overall quality of regulatory analyses leaves much to be desired: the average total score for the 108 regulations included from 2008 to 2012 was 31.2 out of 60 possible points—barely 50 percent.

3. The quality of analyses accompanying several "interim final regulations" created in 2010 to quickly implement PPACA was even worse.[25]

If members of Congress are concerned with the human costs of regulations, Congress should be concerned that regulatory analyses are poorly performed. One reason that the regulatory analyses of the interim final regulations related to PPACA scored so poorly, for example, was that the analyses often ignored more effective or less costly alternatives.[26] A better analysis might have led to a better regulation and therefore lowered the human costs of that regulation.

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23. The project and data are more fully described at mercatus.org/reportcard. The methodology is fully described in Jerry Ellig and Patrick A. McLaughlin, "The Quality and Use of Regulatory Analysis in 2008," *Risk Analysis* 32, no. 5 (2012): 855–880.
24. Patrick A. McLaughlin and Jerry Ellig, "Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration," *Administrative Law Review* 63 (2011): 179–202.
25. Christopher J. Conover and Jerry Ellig, "The Poor Quality of Affordable Care Act Regulations" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, January 2012), http://mercatus.org/publication/poor-quality-affordable-care-act-regulations.
26. Conover and Ellig, "Poor Quality of ACA Regulations," 2012, 1.

It is also worth considering whether any of Congress's actions or inactions are contributing to this failure. Given that statutory deadlines are associated with lower-quality analyses, perhaps such deadlines and similar pressures to quickly produce a final rule should be reconsidered.

Congress could also use the Congressional Review Act to overturn some rules if the analyses accompanying them are found to be insufficient. Perhaps an easier option, though, is simply to increase congressional oversight of regulatory agencies through hearings, meetings, public comments on rules, and other lines of communication.

For those concerned that the regulatory process is not doing a good enough job in producing the best regulations at the least cost, I recommend the attached publication by economist Jerry Ellig titled, "Ten Principles for Better Regulation."[27]

CONCLUSION

Regulations have been consistently accumulating for decades. We cannot have confidence agencies make the best regulatory choices because their analysis is unsatisfactory. In general, regulations are costly. Poorly executed regulations are even costlier. If time can improve regulations, then time should be taken.

27. Also available online at http://mercatus.org/sites/default/files/Ellig_10RegPrinciples_v1.pdf.

ABOUT THE AUTHOR

Patrick A. McLaughlin is a senior research fellow at the Mercatus Center at George Mason University. His research primarily focuses on regulations and the regulatory process, and he is the creator and cofounder of RegData. His work has been featured in numerous scholarly journals, including *American Law and Economics Review*, *Administrative Law Review*, *Regulation & Governance*, *Risk Analysis*, and *Public Choice*. Dr. McLaughlin received a PhD in economics from Clemson University.

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PREPARED STATEMENT OF JANETTE FENNELL WITH ATTACHMENTS

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Testimony of

Janette E. Fennell
Founder and President
KidsAndCars.org

Hearing before the

Senate Committee on the Judiciary

Subcommittee on Oversight, Federal Rights, and Agency Action

On

"Justice Delayed: The Human Cost of Regulatory Paralysis"

Thursday, August 1, 2013

My name is Janette Fennell and I am the founder and president of KidsAndCars.org. In 1996, after my family had been kidnapped at gunpoint and locked in the trunk of our vehicle, we were able to use this traumatic experience to help guide the Federal Regulatory process to ensure that no one else had to end up in the trunk of a vehicle without a way to escape. Now, all vehicles 2002 or newer come with a glow-in-the-dark internal trunk release as standard equipment. Though we are proud of that accomplishment, the most important lesson we continue to learn every day is that these simple changes to vehicles save lives. In fact, not one person has died in a vehicle equipped with an internal trunk release mechanism. Not one.

After our success with internal trunk releases, we were constantly being asked to assist others with issues that were important to them. Calls came from people who were trying to prevent children from being strangled by an over-powered power window. Families called because their child was killed when a vehicle was inadvertently set into motion. The common element in all of these situations was that these incidents took place off public roads and highways; yet no government agency collected data about these vehicle related injuries and deaths. It is then when I went on to form KidsAndCars.org a national nonprofit organization dedicated to preventing injury and death to children. We are the only national children safety organization with an in-depth specialty regarding events that take place off public roads and highways. We work solely on these issues and they are most commonly referred to as nontraffic incidents.

KidsAndCars.org promotes awareness among parents, caregivers and the general public about the dangers to children, including backover and frontover incidents, and heat stroke from being inadvertently left in a vehicle. The organization works to prevent tragedies through data collection, education and public awareness, policy change, product redesign and survivor advocacy.

Because we were the only organization collecting data about the many different ways children were being injured or killed on private property, we were the first agency to learn about children being hurt or killed when a driver is slowly backing up their vehicle and coined the term 'backover.' During the 2000-2003 time-frame, we noticed a huge jump in the numbers of children who were being seriously injured or killed because drivers could not see them behind their vehicles. KidsAndCars.org is the organization that brought this issue to the national agenda as we continue to work to prevent such unthinkable tragedies.

I find it just as amazing today as I did the first day that I learned our country does not have a regulation about what a driver should be able to see when backing up their vehicle. We have been manufacturing vehicles in this country for over 100 years, yet a regulation has never been written that defines what you should be able to see when backing your vehicle. I'm quite sure that no one would purchase a vehicle if they could not see 20-30 feet in front of them; yet we have all been purchasing defective vehicles that do not provide you with the ability to see what is behind you when backing.

It made no sense to us that drivers are behind the wheel of a 3000-pound lethal weapon, and cannot see what is behind them when backing their vehicle. We then partnered with Consumers Union, the publisher of Consumer Reports, after we realized that consumers are literally backing up blindly. Consumers Union then began measuring the area behind a vehicle where a driver could not see even when they had their side and rearview mirror set perfectly. Drivers 5' 4" and 5' 8" were both tested because even how tall you are can determine what you can see behind your vehicle. Attached to this testimony is a chart with their findings.

EVERY vehicle has a blindzone, the term we coined to describe the area behind a vehicle that cannot be seen by a driver. We do not refer to that area as a 'blind spot' because not only has that term already been associated with the area a driver cannot see when they are changing lanes, but when the area behind a typical vehicle where you cannot see a child is approximately 8 feet wide and from 8-60 feet long, we knew that large of an area could never be referred to as a 'spot.'

We simply must not allow drivers in this country to backup blindly from this day forward. Children and older adults are being killed in unprecedented numbers. It is impossible to avoid hitting something you literally cannot see.

When the National Highway Traffic Safety Administration (NHTSA) were tasked with writing a rule so people could see what was behind them while backing their vehicle they could have taken many different avenues to accomplish this. The most obvious one would be that auto manufacturers must redesign all of their vehicles so when you are backing up the driver can see what is behind them. That would be a prohibitively expensive rule to issue.

But NHTSA did not choose that route. They examined and tested other ways to make sure drivers could see what is behind them. NHTSA discovered that a good quality rearview camera system was not only effective, but it was a relatively simple and cost-effective method for providing drivers with the ability to see behind their vehicle while backing.

Yet, the pending rule we need to have issued is not really about cameras; it's about issuing a standard. If an auto company can provide visibility behind a vehicle by using mirrors or any other method, they should do it. We are simply asking that NHTSA be allowed to issue the rear visibility regulation that is ***100 years overdue***. Maybe auto makers will want to redesign their entire vehicle fleet; but I seriously doubt that. But, we cannot allow children to be injured and killed....AND the auto industry knows we are backing up blindly.

Unfortunately our parents and others are learning that you cannot see a child behind their vehicle the hard way.....after they have backed over and killed someone they love more than life itself; their child.

Please, RELEASE THE REAR VISIBILITY STANDARD

Since 2008, when the Cameron Gulbransen Kids Transportation Safety Act was passed and signed by President George W. Bush, more than 1,100 needless deaths and over 85,000 injuries have occurred due to a predictable and preventable backover tragedy

THE PROBLEM:

Every week in the United States at least 50 children are backed over by a vehicle; 48 are treated in hospital emergency rooms and at least 2 children die. There are approximately 228 fatalities and 17,000 injuries per year in backover incidents according to the National Highway Traffic Safety Administration (NHTSA). The predominant age group of victims of this tragic epidemic is most commonly 1-year-old children, specifically between 12 and 23 months old. Another age group that is disproportionately affected by a backover crash are seniors over the age of 70. ***In over 70% of these incidents, the person behind the wheel of the car is a parent or close relative.***

THE SOLUTION:

Law Passed in 2008 Requiring Rule by 2011
In response to this growing and preventable public health problem, in February of 2008, Congress passed and President George W. Bush signed the **Cameron Gulbransen Kids Transportation Safety Act** (Pub. L. 110-189). Former Senators Hillary Clinton (D-NY) and John Sununu (R-NH) and current Representatives Jan Schakowsky (D-IL) and Peter King (R-NY) were the primary sponsors of the legislation which garnered strong bi-partisan support in both the House and Senate, having over 80 co-sponsors. There was also support from the auto industry, parents and families affected by backover incidents, and the safety community including KidsAndCars.org, Advocates for Highway and Auto Safety, the American Academy of Pediatrics, Public Citizen, Consumers Union, Center for Auto Safety, Trauma Foundation and others.

The Proposed Rule is now over 2 Years Past Due
The law requires the National Highway Traffic Safety Administration (NHTSA) to expand the driver's rearward field of view in order to allow drivers to detect pedestrians who are in, or who may be entering, the area behind the vehicle and avoid striking them. A crash in which a vehicle, moving in reverse, strikes a non-occupant, that is a child, pedestrian or cyclist, is called a backover crash.

The final rule required by this law has yet to be issued and is now over two years overdue. The bill was signed into law on February 28, 2008, and it required the Department of Transportation (DOT) to issue a rule by February 28, 2011. This delay is unacceptable and has contributed to a continued tragic and unnecessary loss of life. Since the law was passed, NHTSA reports that there have been over 1,100 deaths and 85,000 injuries in backover crashes.

Technology is Available and Inexpensive
The technology to prevent these deadly crashes is readily available and affordable. Seventy percent (70%) of 2012 model year vehicles are already offering a rear view camera system as an option on one or more trim levels, according to data from Edmunds.com. The costs of these cameras are well-below agency predictions. The cost estimates for rearview cameras from NHTSA in 2010 of $159 to $203 are now inflated and do not account for the dramatic decline in the cost of associated technologies. For example, the Audiovox ACA250 wireless (after-market) rearview video camera and monitor is available for less than $100, which is 37% less than the minimum cost estimate used by NHTSA. Furthermore, there is an increased use of screens in many vehicles compared to when the NHTSA analysis was completed. For every vehicle with a screen available, the cost of installation is reduced by between 53% and 64% according to NHTSA.

Number of Lives Which Could be Saved is Underestimated and Undervalued
The benefit-cost analysis performed by NHTSA undercounts the number of lives that have the potential to be saved by the technology. The databases on which the agency relies to estimate the number of individuals injured or killed in backover crashes may not be accurately capturing all events. Previous agency analysis of heat stroke deaths using the same databases used in the backover analysis were found to have missed 33% of fatalities when compared with a database of incidents gathered from victims' families, news and police reports.

Additionally, NHTSA recently released an updated estimate of the Value of a Statistical Life (VSL) of $9.1 million. This figure is 50% greater than the VSL NHTSA used in the Preliminary Regulatory Impact Analysis (PRIA) of $6.1 million. Moreover, children under the age of 5 account

for 44% of those killed in backover incidents. NHTSA has acknowledged that the strict benefit-cost analysis does not account for the difficult to quantify premium the public places on preventing the injury or death of a child.

Cameras Already in Many Cars and Consumers are Willing to Pay for Safety
NHTSA predicted that only approximately 20% of vehicles would have a rearview camera in 2010. However, according to Edmunds.com data, 70% of 2012 model year vehicles have backup cameras available on one or more trim levels. For example, the Honda Civic, which was the fifth most sold vehicle in the U.S. in 2012, now comes with a rearview camera as standard equipment. (The MSRP for the 2013 Honda Civic is $17,965)8 Moreover, history has proven that safety sells. One only has to look at the development of airbags, seatbelts and the coveted IIHS Top Pick safety ratings to see that safety has become a large part of the automobile purchasing decision. A $100 rearview camera system could prevent a driver from backing into something and causing expensive and extensive damage to your bumper or, more importantly, save the life of a child.

Parents and safety advocates can no longer be drained emotionally and financially
Parents of children killed in backover tragedies and safety groups have come to Capitol Hill countless times to participate in press events, urge members of Congress to support a rear visibility standard and now plead with the Obama Administration to release a rear visibility rule for motor vehicles. Every hurdle that has been put before this dedicated yet completely unselfish group has been met. Nothing the parent advocates have done and continue to do will ever bring back their beloved child. This citizenry has spent over 8-years doing everything possible to protect another family from having to live with the unending grief they deal with on a daily basis.

After the bill was passed and after the Notice of Proposed Rule-Making was issued, a March 23, 2011 public meeting was held at the media center at the Department of Transportation (DOT) in Washington, DC. This type of 'additional scrutiny' is not usually part of the rulemaking process. Yet, from 9:00am until 3:00pm, parents, family members and safety groups like Advocates for Highway and Auto Safety, Consumers Union, the Consumer Federation and others spoke to the leaders at NHTSA about the utmost importance of ensuring this rulemaking is finalized. At this public meeting, not one negative comment was heard and there certainly weren't any protestors marching outside against the rear visibility rule. At that point the rule was only delayed by about one-month, but no one could have ever predicted after such a strong and positive showing that now, over 2 years later, we would still be begging for this standard to be issued.

Strong bipartisan support from Congress required this safety rule in the Cameron Gulbransen Kids Transportation Safety Act. It is the law. So many other actions that President Obama has demonstrated indicates that the safety of our children is a top priority. In fact President Obama was a co-sponsor of the legislation while serving in the Senate and now as our leader he needs to issue the required rule. It is imperative that the Office of Management and Budget along with the President take one simple step and issue the rear visibility rule immediately.

These unacceptable and unnecessary deaths and injuries from backover tragedies must stop.

Please, RELEASE THE REAR VISIBILITY STANDARD.

The danger of blind zones

The area behind your vehicle can be a killing zone

Every year, children are injured and killed because drivers (in 70% of cases, parents and relatives) don't see them while backing up. According to KIDS AND CARS (www.kidsandcars.org), a nonprofit group that works to improve child safety around cars, at least 50 children are backed over every week in the U.S. Forty-eight are treated in hospital emergency rooms and at least 2 children die.

A contributing factor is that larger vehicles (SUVs, pickups, and minivans), which have become increasingly popular, have larger blind zones than passenger cars. A blind zone is the area behind a vehicle that a person can't see from the driver's seat.

To help consumers understand how large some blind zones are, Consumer Reports has measured the blind zones of a number of popular models. The results for both an average-height driver (5 feet 8 inches) and a shorter driver (5 feet 1 inch) are listed in the accompanying charts.

To measure the blind zones, a 28-inch traffic cone was positioned behind the vehicle at the point where the driver could just see its top. As the illustration shows, longer and taller vehicles tend to have significantly larger blind zones. (The shading shows the length of each blind zone; lighter for an average-height driver, darker for a shorter driver.)

Bottom line

Your best defense against backover accidents is to get out of your vehicle and check behind it just before you back up. If kids are nearby, make sure you can see them while backing up.

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Blind-zone measurements: Small Sedans

This chart shows the length of the blind zone of each listed vehicle. The distance noted is how far behind the vehicle a 28-inch traffic cone had to be before the person, sitting in the driver's seat, could see its top by looking through the rear window.

Make/Model	Year	Driver 5 feet 8 inches	Driver 5 feet 1 inches
Small Four-Door Sedans			
Chevrolet Cavalier LS	2003	9	17
Chevrolet Cobalt LS	2005	10	24
Chevrolet Cobalt LT	2008	17	39
Chevrolet Cruze LS	2011	9	20
Dodge Neon SXT	2003	17	43
Ford Fiesta SE (sedan)	2011	19	33
Ford Focus SES	2008	17	27
Ford Focus ZX4 SES	2005	12	24
Ford Focus ZX4 ST	2005	14	30
Honda Civic EX	2005	8	18
Honda Civic EX	2006	12	20
Honda Civic Hybrid	2003	12	28
Honda Civic Hybrid	2006	12	21
Hyundai Elantra GLS	2007	10	17
Hyundai Elantra GLS	2011	13	25
Hyundai Elantra GT	2005	8	19
Kia Forte	2010	11	24
Kia Spectra EX	2004	13	20
Mazda 3i Touring	2010	11	22
Mazda3i	2004	12	22
Mitsubishi Lancer ES	2007	10	19
Mitsubishi Lancer EVO	2003	14	31
Mitsubishi Lancer EVO	2008	17	37
Mitsubishi Lancer Ralliart	2010	11	25
Nissan Sentra	2007	12	18
Nissan Versa	2009	12	24
Saturn Ion 3	2005	12	21
Subaru Impreza 2.5 i	2006	6	11
Subaru Impreza 2.5 i	2008	11	29
Subaru WRX	2008	11	24
Subaru WRX STi	2004	14	21
Suzuki Aerio GS	2003	23	49
Suzuki Forenza S	2004	13	16

Suzuku SX4	2010	12	26
Toyota Corolla LE	2009	12	21
Toyota Yaris	2010	7	16
Volkswagen Jetta 2.5	2006	11	22
Volkswagen Jetta TDI	2006	11	22

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Blind-zone measurements: Midsized Sedans

This chart shows the length of the blind zone of each listed vehicle. The distance noted is how far behind the vehicle a 28-inch traffic cone had to be before the person, sitting in the driver's seat, could see its top by looking through the rear window.

Make/Model	Year	Driver 5 feet 8 inches	Driver 5 feet 1 inches
Midsized Sedans			
Acura RL	2005	10	23
Acura RL	2009	16 (with no camera), 0 with camera	25 (with no camera), 0 with camera
Acura TL	2004	16	22
Acura TL	2009	13	25
Acura TSX	2004	14	12
Audi A4 1.8T	2004	11	19
Audi A4 2.0T	2006	11	21
Audi A4 2.0T	2009	8	18
Audi A6 3.2 Quattro	2005	10	19
BMW 325i	2006	12	24
BMW 530i	2004	15	21
BMW 535i	2011	10 (no camera), 0 with camera	21 (no camera), 0 with camera
Buick LaCrosse CXL	2005	15	21
Cadillac CTS	2003	11	25
Cadillac CTS 2.8	2006	11	25
Cadillac CTS 3.6	2008	14	28
Cadillac STS	2005	21	27
Chevrolet Impala 3LT	2006	12	28
Chevrolet Impala LS	2004	14	26
Chevrolet Malibu Base (4 cyl.)	2004	12	17
Chevrolet Malibu LS (6 cyl.)	2004	12	17
Chevrolet Malibu LT (4 cyl)	2008	13	23
Chevrolet Malibu LTZ (6 cyl)	2008	14	23
Chrysler Sebring Touring	2007	10	16
Dodge Avenger	2008	10	19
Dodge Stratus SXT	2004	18	22
Ford Fusion SEL	2006	15	26
Ford Fusion SEL V6	2010	25 (no camera), 0 with camera	40 (no camera), 0 with camera
Ford Taurus SES	2004	21	23
Honda Accord EX (4 cylinder)	2003	13	17

Honda Accord EX (6 cylinder)	2003	13	23
Honda Accord EX (6 cylinder)	2006	11	19
Honda Accord EX-L V6	2008	10	24
Honda Accord Hybrid	2005	14	21
Honda Accord LX-P 4 cylinder	2008	11	20
Hyundai Sonata (4cyl)	2009	11	21
Hyundai Sonata GLS (6 cyl)	2006	9	22
Hyundai Sonata Limited 2.0T	2011	13	21
Infiniti G35	2003	11	20
Infiniti G35	2007	13	21
Infiniti M35 X AWD	2006	0 with camera	0 with camera
Infiniti M37	2011	14 (no camera), 0 with camera	24 (no camera), 0 with camera
Jaguar S-Type	2004	10	21
Jaguar XF Luxury	2009	14	29
Kia Optima EX	2004	9	13
Kia Optima EX	2006	11	18
Kia Optima EX V6	2009	9	18
Kia Optima LX four-cylinder	2009	10	17
Kia Optima LX SX 2.0T	2011	16	35
Lexus ES330	2004	12	19
Lexus ES350	2007	17 (no camera), 0 with camera	28 (no camera), 0 with camera
Lexus GS300	2006	0 with camera	0 with camera
Lexus GS450h	2007	10 (no camera), 0 with camera	17 (no camera), 0 with camera
Lexus HS250h	2010	12	17
Lexus IS250	2006	13	21
Lincoln LS Premium	2003	15	26
Lincoln MKZ	2010	17	31
Lincoln Zephyr	2006	18	33
Mazda6	2009	13	25
Mazda6 i (4 cylinder)	2003	12	22
Mazda6 s (6 cylinder)	2003	12	19
Mercedes-Benz C230	2006	10	15
Mercedes-Benz C300	2008	8	16
Mercedes-Benz CLS500	2006	11	20
Mercedes-Benz E320	2004	12	18
Mercedes-Benz E350	2010	8 (no camera), 0 with camera	17 (no camera), 0 with camera
Mercury Milan	2006	17	35
Mitsubishi Galant ES	2004	19	25
Mitsubishi Galant GTS	2005	21	29
Nissan Altima 2.5S	2005	11	21

Nissan Altima 2.5S	2007	10	18
Nissan Altima 3.5 SE	2007	13 (no camera), 0 with camera	22 (no camera), 0 with camera
Nissan Maxima 3.5 SE	2004	12	27
Nissan Maxima 3.5 SL	2007	11	15
Nissan Maxima 3.5SV	2009	13	22
Nissan Sentra SE-R	2008	18	28
Pontiac G6	2005	18	27
Pontiac G8 GT	2009	15	24
Pontiac Grand Prix GT2	2004	13	20
Saab 9-3 2.0T	2006	12	22
Saab 9-3 Aero	2003	16	29
Saab 9-5 2.3T	2007	12	24
Saab 9-5 Arc	2004	13	19
Saturn Aura XR	2007	15	30
Saturn L300	2003	13	27
Subaru Legacy 2.5 GT Limited	2005	11	18
Subaru Legacy 2.5i Premium	2010	12	23
Subaru Legacy 2.5i SE	2008	10	21
Subaru Legacy 3.6R Limited	2010	12	23
Subaru Legacy L	2003	13	25
Suzuku Kizashi	2010	14	26
Suzuki Verona LX	2004	15	22
Toyota Camry	2005	13	24
Toyota Camry Hybrid	2007	11	20
Toyota Camry LE	2010	16	23
Volkswagen Passat 2.0T	2006	13	22
Volkswagen Passat 3.6L	2006	12	22
Volkswagen Passat CC	2009	13	25
Volkswagen Passat GLS TDI	2004	10	15
Volkswagen Passat GLX	2003	9	23
Volvo S40	2004	11	18
Volvo S60 2.5T	2004	13	19
Volvo S80 T6	2004	15	19

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Blind-zone measurements: Large Sedans

This chart shows the length of the blind zone of each listed vehicle. The distance noted is how far behind the vehicle a 28-inch traffic cone had to be before the person, sitting in the driver's seat, could see its top by looking through the rear window.

Make/Model	Year	Driver 5 feet 8 inches	Driver 5 feet 1 inches
Large Sedans			
Audi A8 L	2004	20	27
BMW 745Li	2003	14	25
Buick LaCrosse CXS (4-cyl)	2010	16	27
Buick LaCrosse CXS	2010	19 (no camera), 0 with camera	32 (no camera), 0 with camera
Buick Lucerne	2006	16	24
Buick Park Avenue Ultra	2003	9	20
Cadillac DTS	2006	12	30
Chrysler 300 Touring	2005	16	23
Chrysler 300C	2005	16	23
Dodge Charger SXT (6 cyl)	2006	11	22
Ford Five Hundred SEL AWD, FWD	2005	10	16
Ford Taurus Limited	2008	11	20
Ford Taurus Limited	2010	23	37
Hyundai Azera Limited	2006	11	21
Hyundai Genesis	2009	11	20
Hyundai XG350 L	2003	9	24
Jaguar XJ8 Vanden Plas	2004	11	19
Kia Amanti	2004	10	21
Lexus LS430	2003	9	16
Lexus LS460	2007	15 (no camera), 0 with camera	25 (no camera), 0 with camera
Lincoln MKS	2010	20 (no camera), 0 with camera	34 (no camera), 0 with camera
Lincoln Town Car (standard wheel base)	2003	12	21
Mercedes-Benz S430	2003	11	22
Mercedes-Benz S550	2007	12	21
Mercury Grand Marquis LSE	2003	11	23
Toyota Avalon XLS	2005	15	25

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Blind-zone measurements: Coupes

This chart shows the length of the blind zone of each listed vehicle. The distance noted is how far behind the vehicle a 28-inch traffic cone had to be before the person, sitting in the driver's seat, could see its top by looking through the rear window.

Make/Model	Year	Driver 5 feet 8 inches	Driver 5 feet 1 inches
Two-Door Coupes and Sports Cars			
BMW 135i	2008	11	15
BMW 650i	2006	10	18
Chevrolet Camaro SS	2010	9	19
Chevrolet Cobalt SS Coupe	2005	23	32
Chevrolet Cobalt SS Coupe	2008	21	39
Chevrolet Corvette Z06	2006	11	15
Chevrolet Monte Carlo SS	2006	17	24
Chrysler Crossfire	2004	18	22
Dodge Viper	2006	13	29
Ford Mustang GT (coupe)	2010	15	24
Honda Civic Si	2006	15	19
Hyundai Genesis Coupe	2010	16	25
Hyundai Tiburon GT	2003	10	23
Kia Forte Koup SX	2010	12	20
Mazda RX-8	2003	14	19
Mitsubishi Eclipse GS	2006	14	23
Nissan 350Z Touring	2003	12	20
Nissan 370Z	2010	9	18
Porsche 911	2006	6	12
Volkswagen R32	2008	8	14

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Blind-zone measurements: Convertibles & Roadsters

This chart shows the length of the blind zone of each listed vehicle. The distance noted is how far behind the vehicle a 28-inch traffic cone had to be before the person, sitting in the driver's seat, could see its top by looking through the rear window.

Make/Model	Year	Driver 5 feet 8 inches	Driver 5 feet 1 inches
Convertibles and Roadsters			
Audi A5 2.0T convertible	2010	7 top up/ 6 top down	16 top up/ 10 top down
BMW 328i convertible	2008	8 top up/ 6 top down	17 top up/ 9 top down
Chrysler PT Cruiser Convertible	2005	13 top up / 20 top down	20 top up / 29 top down
Chrysler Sebring Limited	2005	10 top up / 9 top down	18 top up / 19 top down
Chrysler Sebring Limited	2009	13 top up/13 top down	23 top up/ 23 top down
Ford Mustang Convertible	2005	10 top up / 10 top down	21 top up / 21 top down
Ford Mustang GT Convertible	2011	16 top up / 16 top down, 0 with camera	27 top up / 27 top down, 0 with camera
Infiniti G37 convertible	2010	9 top up / 9 top down, 0 with camera	17 top up / 17 top down, 0 with camera
Jaguar XK	2007	13 top up / 7 top down	22 top up/14 top down
Lexus IS250c	2010	13 top up / 13 top down	23 top up/26 top down
Mazda MX-5 Miata	2006	3 top up / 2 top down	6 top up / 6 top down
Mazda MX-5 Miata PRHT	2010	3 top up / 3 top down	5 top up / 5 top down
Mercedes-Benz SL550	2007	5 top up/5 top down	11 top up/11 top down
MINI Cooper S Convertible	2005	6 top up / 14 top down	13 top up / 29 top down
Mitsubishi Eclipse convertible	2008	13 top up/ 9 top down	35 top up/ 21 top down
Pontiac G6 GT	2008	22 top up/ 14 top down	32 top up/ 22 top down
Pontiac Solstice	2006	4 top up/3 top down	18 top up/10 top down
Porsche Boxster 2.7	2002	2 top up	20 top up
Saab 9-3 2.0T convertible	2008	14 top up/ 12 top down	29 top up/ 22 top down
Saturn Sky Redline	2007	3 top up / 3 top down	5 top up / 5 top down
Toyota Camry Solara SLE	2005	16 top up / 17 top down	23 top up / 21 top down
Volkswagen Beetle GLS	2005	6 top up / 19 top down	16 top up / 52 top down
Volkswagen Eos	2008	12 top up/ 8 top down	21 top up/ 14 top down
Volvo C70	2008	13 top up/ 12 top down	21 top up/ 17 top down

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Blind-zone measurements: Small SUVs

This chart shows the length of the blind zone of each listed vehicle. The distance noted is how far behind the vehicle a 28-inch traffic cone had to be before the person, sitting in the driver's seat, could see its top by looking through the rear window.

Make/Model	Year	Driver 5 feet 8 inches	Driver 5 feet 1 inches
Small SUVs - Two Door			
Jeep Wrangler Sport Unlimited	2005	5	11
Small SUVs - Four Door			
Chevrolet Equinox LT	2004	18	28
Chevrolet Equinox LT	2007	21	29
Chevrolet Equinox LT	2010	7	21
Dodge Nitro SLT	2007	13	23
Ford Escape XLT	2004	13	16
Ford Escape XLT	2008	11	17
Honda CR-V EX	2005	14	20
Honda CR-V EX	2007	17	22
Honda Element EX	2003	18	35
Honda Element EX	2007	19	23
Hyundai Santa Fe Limited	2007	19	30
Hyundai Tucson 4WD GLS	2005	13	27
Infiniti EX35	2008	10	16
Jeep Compass Sport	2007	13	18
Jeep Liberty Limited diesel	2005	12	18
Jeep Liberty Sport	2008	15	22
Jeep Patriot	2007	13	18
Jeep Wrangler Unlimited	2007	8	22
Kia Sorento LX	2008	12	20
Kia Sportage EX	2007	12	21
Mitsubishi Outlander LS	2009	12	19
Mitsubishi Outlander XLS	2003	15	26
Mitsubishi Outlander XLS	2007	13	20
Nissan Rogue	2008	16	23
Nissan Xterra S	2005	10	18
Pontiac Aztek	2003	9	14
Saturn Vue Greenline	2007	18	26
Saturn Vue V6	2004	16	22
Saturn Vue XR	2008	15	22
Subaru Forester 2.5 X	2003	7	12
Subaru Forester 2.5 X	2006	9	12

Subaru Forester 2.5X	2009	8	16
Subaru Forester 2.5XT Sports	2007	8	13
Suzuki XL7	2007	25	46
Toyota FJ Cruiser	2007	14	27
Toyota RAV4	2004	12	22
Toyota RAV4 Base (4cyl)	2006	18	25
Toyota RAV4 Limited (V6)	2006	16	21
Volkswagen Tiguan SEL	2009	12	19

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Blind-zone measurements: Midsized SUVs

This chart shows the length of the blind zone of each listed vehicle. The distance noted is how far behind the vehicle a 28-inch traffic cone had to be before the person, sitting in the driver's seat, could see its top by looking through the rear window.

Make/Model	Year	Driver 5 feet 8 inches	Driver 5 feet 1 inches
Midsized SUVs			
Acura MDX Tech	2007	19 (no camera), 0 with camera	23 (no camera), 0 with camera
Acura MDX Touring	2003	0 with camera	0 with camera
Acura RDX Tech	2007	13 (no camera), 0 with camera	21 (no camera), 0 with camera
Audi Q7	2007	12 (no camera), 0 with camera	19 (no camera), 0 with camera
BMW X3	2007	14	24
BMW X5 3.0i	2005	17	28
BMW X5 3.0i	2007	18 (no camera), 0 with camera	21 (no camera), 0 with camera
Buick Enclave	2008	23	30
Cadillac SRX V6	2007	16	26
Cadillac SRX V8	2004	19	27
Chevrolet TrailBlazer EXT LT	2003	19	35
Chevrolet TrailBlazer LT (standard wheelbase)	2006	16	21
Chevrolet Traverse	2009	23 (no camera), 0 with camera	30 (no camera), 0 with camera
Chrysler Pacifica	2004	21	39
Dodge Journey	2009	15	26
Ford Edge SEL	2007	19	28
Ford Edge SEL	2011	16 (no camera), 0 with camera	28 (no camera), 0 with camera
Ford Explorer XLT	2006	18	26
Ford Flex SEL	2009	23	35
Ford Freestyle SEL AWD	2005	19	28
Ford Taurus X	2008	17	23
Honda Pilot EX-L	2005	0 with camera	0 with camera
Hummer H3	2006	31	45
Infiniti FX35	2003	15	22
Jeep Commander Limited	2006	44	69
Kia Sorento EX	2011	16 (no camera), 0 with camera	30 (no camera), 0 with camera
Land Rover LR3 V8 SE	2005	26	39

Land Rover LR4	2010	23 (no camera), 0 with camera	38 (no camera), 0 with camera
Land Rover Range Rover Sport	2008	11	19
Lexus GX470	2004	15	24
Lexus RX350	2007	17 (no camera), 0 with camera	21 (no camera), 0 with camera
Lexus RX400h	2006	17 (no camera), 0 with camera	21 (no camera), 0 with camera
Lincoln MKT	2010	0 with standard camera	0 with standard camera
Lincoln MXX	2007	25 (no camera), 0 with camera	27 (no camera), 0 with camera
Mazda CX-7	2007	15 (no camera), 0 with camera	18 (no camera), 0 with camera
Mazda CX-9 Grand Touring	2008	22 (no camera), 0 with camera	31 (no camera), 0 with camera
Mercedes-Benz ML350	2006	16	24
Mercedes-Benz R500	2006	13	19
Mercury Mountaineer Luxury AWD	2005	14	18
Mitsubishi Endeavor XLS	2004	18	30
Mitsubishi Montero Limited	2003	11	23
Nissan Murano SL	2005	14	22
Nissan Pathfinder LE	2005	14	18
Porsche Cayenne S	2008	14 (no camera), 0 with camera	24 (no camera), 0 with camera
Saturn Outlook XR	2007	26	46
Subaru B9 Tribeca	2006	19	29
Subaru Tribeca	2008	18	29
Toyota 4Runner SR5	2003	13	22
Toyota 4Runner SR5	2010	13 (no camera), 0 with camera	20 (no camera), 0 with camera
Toyota Highlander Hybrid	2006	17	20
Toyota Highlander Limited	2008	19	29
Volkswagen Touareg	2004	11	22
Volkswagen Touareg	2008	13 (no camera), 0 with camera	19 (no camera), 0 with camera
Volvo XC90 T6	2003	14	25
Volvo XC90 V8	2006	18	28

Posted: October 2005 — Last reviewed: June 2011

Blind-zone measurements: Large SUVs

This chart shows the length of the blind zone of each listed vehicle. The distance noted is how far behind the vehicle a 28-inch traffic cone had to be before the person, sitting in the driver's seat, could see its top by looking through the rear window.

Make/Model	Year	Driver 5 feet 8 inches	Driver 5 feet 1 inches
Large SUVs			
Chevrolet Suburban 1500	2005	18	25
Chevrolet Suburban 1500	2007	18 (no camera), 0 with camera	29 (no camera), 0 with camera
Chevrolet Tahoe LT	2007	16	38
Dodge Durango	2008	18	29
Ford Expedition EL	2007	23	39
Hummer H2	2008	30 (no camera), 0 with camera	47 (no camera), 0 with camera
Lincoln Navigator Ultimate	2007	25	39
Mercedes-Benz GL450	2007	21	37
Nissan Pathfinder Armada LE	2004	17	24
Toyota Land Cruiser	2008	17	27
Toyota Sequoia Limited	2002	14	25
Toyota Sequoia Limited	2008	16 (no camera), 0 with camera	22 (no camera), 0 with

Posted: October 2005 — Last reviewed: June 2011

Blind-zone measurements: Pickups

This chart shows the length of the blind zone of each listed vehicle. The distance noted is how far behind the vehicle a 28-inch traffic cone had to be before the person, sitting in the driver's seat, could see its top by looking through the rear window.

Make/Model	Year	Driver 5 feet 8 inches	Driver 5 feet 1 inches
Pickups			
Chevrolet Avalanche 1500	2002	29	51
Chevrolet Avalanche LT	2007	31 (no camera), 0 with camera	50 (no camera), 0 with camera
Chevrolet Colorado Crew Cab LS	2005	18	25
Chevrolet Silverado 1500	2004	23	37
Chevrolet Silverado 1500 LT	2007	26	38
Chevrolet Silverado 2500 LTZ	2007	31	40
Dodge Dakota SLT	2005	17	24
Dodge Ram 1500 SLT	2004	26	35
Dodge Ram 1500 SLT	2007	22	31
Dodge Ram 1500 SLT	2009	24	35
Ford Explorer Sport Trac XLT	2007	22	33
Ford F-150 XLT	2004	34	45
Ford F-150 XLT	2007	28	39
Ford F-150 XLT	2009	31	45
Ford F-250 Super Duty Lariat	2008	21	33
Honda Ridgeline RTS	2006	18	28
Nissan Frontier LE	2005	16	25
Nissan Titan SE	2004	25	42
Toyota Tacoma	2005	17	24
Toyota Tundra SR5	2004	29	44
Toyota Tundra SR5	2007	29	39

Posted: October 2005 — Last reviewed: June 2011

Blind-zone measurements: Minivans

This chart shows the length of the blind zone of each listed vehicle. The distance noted is how far behind the vehicle a 28-inch traffic cone had to be before the person, sitting in the driver's seat, could see its top by looking through the rear window.

Make/Model	Year	Driver 5 feet 8 inches	Driver 5 feet 1 inches
Minivans			
Chevrolet Uplander LT	2007	19	29
Chrysler Town and Country Limited	2008	13 (no camera), 0 with camera	22 (no camera), 0 with camera
Dodge Grand Caravan SXT	2005	12	20
Dodge Grand Caravan SXT	2008	13 (no camera), 0 with camera	22 (no camera), 0 with camera
Ford Freestar SEL	2004	13	16
Honda Odyssey EX-L RES	2005	16	27
Kia Sedona EX	2003	18	35
Kia Sedona EX	2011	14 (no camera), 0 with camera	25 (no camera), 0 with camera
Mazda MPV ES	2003	12	24
Nissan Quest 3.5 SL	2004	17	28
Nissan Quest 3.5 SL	2007	16 (no camera), 0 with camera	23 (no camera), 0 with camera
Nissan Quest SL	2011	17 (no camera), 0 with camera	26 (no camera), 0 with camera
Saturn Relay FWD 3	2005	19	26
Toyota Sienna XLE FWD	2005	13	28
Toyota Sienna XLE FWD	2010	13 (no cameras), 0 with camera	22 (no camera), 0 with camera
Volkswagen Routan	2009	11	18

Posted: October 2005 — Last reviewed: June 2011

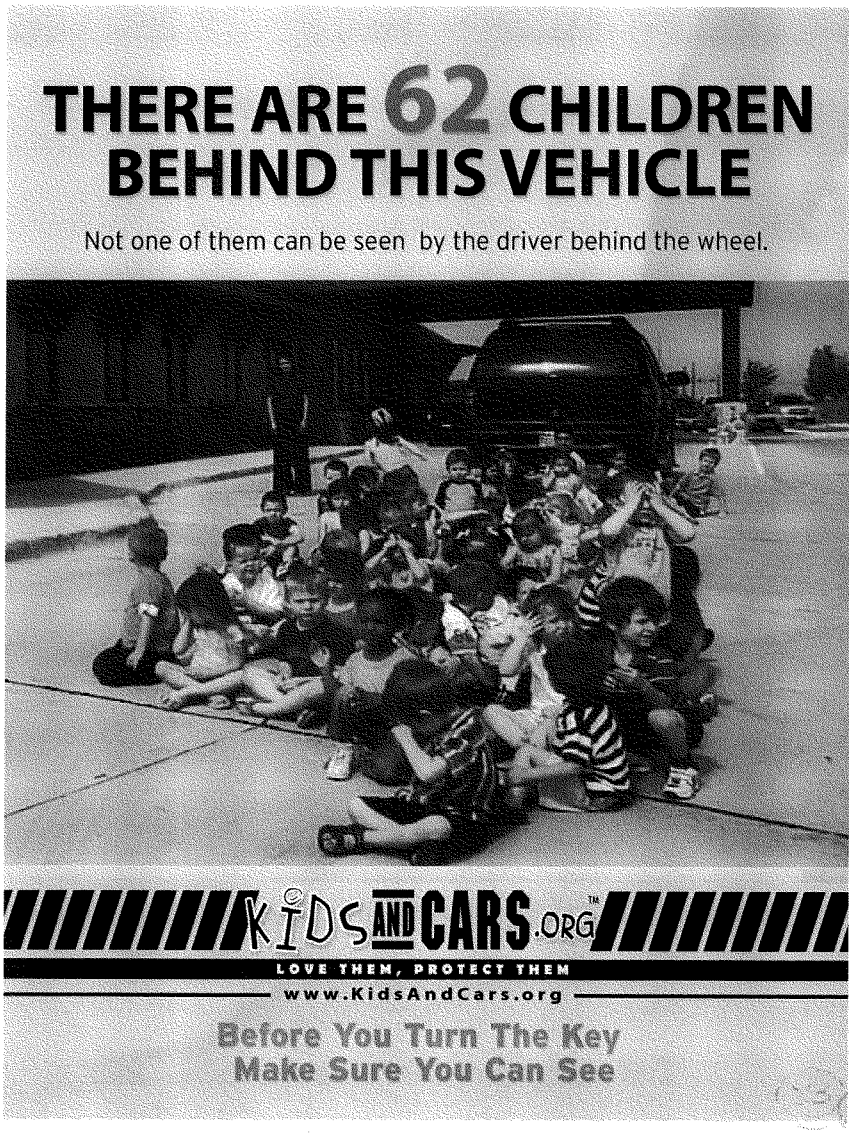
Blind-zone measurements: Wagons & Hatchbacks

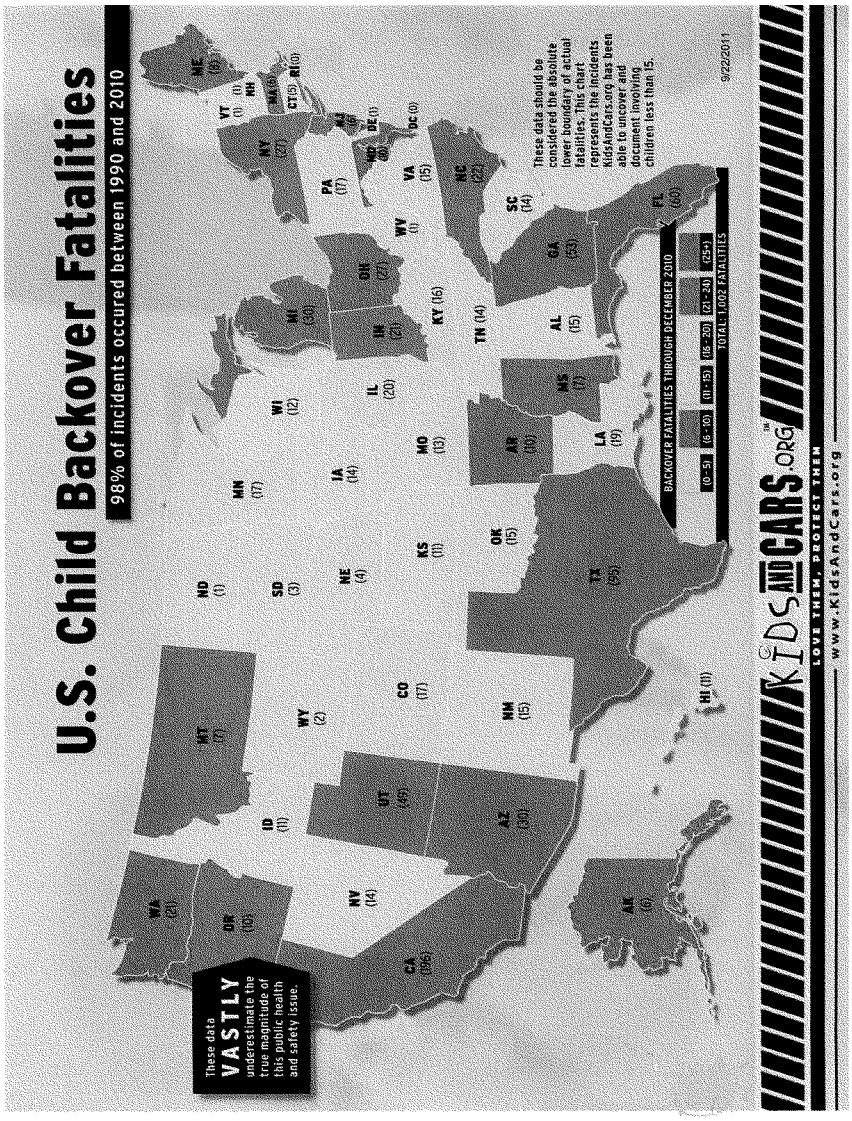
This chart shows the length of the blind zone of each listed vehicle. The distance noted is how far behind the vehicle a 28-inch traffic cone had to be before the person, sitting in the driver's seat, could see its top by looking through the rear window.

Make/Model	Year	Driver 5 feet 8 inches	Driver 5 feet 1 inches
Wagons & Hatchbacks			
Acura RSX	2006	11	21
BMW 325xit	2006	8	13
Chevrolet Aveo LS	2004	5	10
Chevrolet HHR LT	2006	14	20
Chevrolet Malibu LS Maxx	2005	17	23
Chrysler PT Cruiser Limited	2006	8	14
Dodge Caliber R/T AWD	2007	15	20
Dodge Caliber SRT	2008	14	24
Dodge Magnum SXT	2005	13	22
Ford Fiesta SES (hatchback)	2011	7	15
Ford Focus ZX3	2006	7	11
Honda Fit	2007	7	15
Honda Fit	2009	9	16
Honda Insight	2010	7	12
Hyundai Elantra Touring	2009	8	15
Kia Rio5	2006	8	15
Kia Rondo LX	2007	11	17
Kia Soul Plus	2010	8	19
Mazda2	2011	4	12
Mazda3 Sport (hatchback)	2010	6	13
Mazda3s Grand Touring	2006	6	10
Mazda6 wagon	2004	16	19
Mazdaspeed3	2007	6	10
Mazdaspeed3	2010	6	10
Mercedes-Benz B200	2007	4	12
Mini Cooper Clubman	2008	7	11
Mini Cooper S	2007	5	13
Pontiac Vibe	2006	11	21
Saturn Astra XE	2008	7	17
Scion xA	2004	7	11
Scion xB	2004	8	11
Scion xB	2007	12	21
Scion xD	2008	8	21

Smart ForTwo	2008	4	7
Subaru Impreza Outback Sport	2008	6	11
Subaru Outback 2.5i	2005	13	18
Subaru Outback 3.0R VDC	2006	11	16
Subaru WRX STi	2008	8	15
Suzuki SX4 Crossover AWD	2010	8	19
Suzuki SX4 Sport	2007	9	17
Toyota Matrix	2009	13	18
Toyota Prius	2008	6 (no camera), 0 with camera	10 (no camera), 0 with camera
Toyota Prius	2010	6	12
Toyota Yaris (3 door hatch)	2007	6	10
Toyota Yaris (5 door hatch)	2009	6	10
Volkswagen Golf	2010	7	15
Volkswagen GTI (2 door)	2006	8	18
Volkswagen GTI (4 door)	2010	8	14
Volkswagen Jetta Sportswagen	2009	10	15
Volkswagen Rabbit (four-door)	2008	8	14
Volvo C30	2008	4	8
Volvo V50 T5	2005	8	13
Volvo XC70	2008	10	14

Posted: October 2005 — Last reviewed: June 2011


THERE ARE 62 CHILDREN
BEHIND THIS VEHICLE
Not one of them can be seen by the driver behind the wheel.
KIDS AND CARS.ORG™
LOVE THEM, PROTECT THEM
www.KidsAndCars.org
Before You Turn The Key
Make Sure You Can See


U.S. Child Backover Fatalities
98% of incidents occured between 1990 and 2010
These data VASTLY underestimate the true magnitude of this public health and safety issue.
These data should be considered the absolute lower boundary of actual fatalities. This chart represents the incidents KidsAndCars.org has been able to uncover and document involving children less than 15.
BACKOVER FATALITIES THROUGH DECEMBER 2010
(0 - 5) (6 - 10) (11 - 15) (16 - 20) (21 - 24) (25+)
TOTAL: 1,002 FATALITIES
9/22/2011
KIDS AND CARS .ORG
LOVE THEM, PROTECT THEM
www.KidsAndCars.org

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LOVE THEM, PROTECT THEM

www.KidsAndCars.org

7532 Wyoming Street Kansas City, MO 64114 (816) 216-7085

Every year, thousands of children are hurt or die because a driver backing up didn't see them. These incidents for the most part take place in residential driveways or parking lots.

- The predominant age of victims are one year olds. (12-23 months)
- Over 60% of backing up incidents involved a larger size vehicle. (truck, van, SUV)
- Tragically, in over 70% of these incidents, a parent or close relative is behind the wheel.
- The Centers for Disease Control and Prevention 2/18/05 study reports over 2400 children are treated in hospital emergency rooms every year due a child being struck by or rolled over by a vehicle moving in reverse.

In the U.S. fifty children are being backed over by vehicles EVERY week. Forty-eight (48) are treated in hospital emergency rooms and at least two (2) children are fatality injured every WEEK.

Because we are driving larger, longer and higher vehicles we are seeing many more backover incidents. This problem is only going to get worse unless we work for better visibility behind the vehicles we drive. The government is currently working on a rear visibility standard that will be required of all motor vehicles sold or leased in the U.S. The National Highway Traffic Safety Administration has released a proposed rear visibility standard that would require all motor vehicles sold or leased in the U.S. come equipped with backup cameras by the year 2014. The rear visibility standard will be finalized by the end of year 2011.

Education and awareness of backovers will continue to be critical for years to come, despite the fact that new vehicles will all have backup cameras by 2014. That's because there are millions of older-model vehicles being driven that do not have this technology.

KidsAndCars.org urges all adults to heighten their awareness before they engage a vehicle into reverse; especially when children are present. Young children are impulsive and unpredictable; still have very poor judgment and little understanding of danger. In addition, young children do not recognize boundaries such as property lines, sidewalks, driveways or parking spaces. Toddlers have established independent mobility between the ages of 12-23 months, but the concept of personal safety is absent. Backovers are often the predictable consequence of a child following a parent into the driveway and standing behind their vehicle without their parent's knowledge.

Backovers can happen in *ANY* vehicle because all vehicles have a blind zone; the area behind a vehicle you cannot see from the driver's seat. The danger tends to increase with larger vehicles. It's always best to look carefully behind the vehicle before you get in and again before you put the car in gear to back up. Remember to back up slowly, and pay attention to your mirrors.

KIDS AND CARS.ORG™

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www.KidsAndCars.org

7532 Wyoming Street Kansas City, MO 64114 (816) 216-7085

KidsAndCars.org recommendations to keep children safe include:

• Walk around and behind a vehicle prior to moving it.

• Know where your kids are. Make children move away from your vehicle to a place where they are in full view before moving the car and know that another adult is properly supervising children before moving your vehicle.

• Teach children that "parked" vehicles might move. Let them know that they can see the vehicle; but the driver might not be able to see them.

• Consider installing cross view mirrors, audible collision detectors, rear view video camera and/or some type of back up detection device.

• Measure the size of your blind zone (area) behind the vehicle(s) you drive. A 5-foot-1-inch driver in a pickup truck can have a rear blind zone of approximately 8 feet wide by 50 feet long.

• Be aware that steep inclines and large SUV's, vans and trucks add to the difficulty of seeing behind a vehicle.

• Hold children's hand when leaving the vehicle.

• Teach your children to never play in, around or behind a vehicle and always set the emergency brake.

• Keep toys and other sports equipment off the driveway.

• Homeowners should trim landscaping around the driveway to ensure they can see the sidewalk, street and pedestrians clearly when backing out of their driveway. Pedestrians also need to be able to see a vehicle pulling out of the driveway.

• Never leave children alone in or around cars; not even for a minute.

• Keep vehicles locked at all times; even in the garage or driveway.

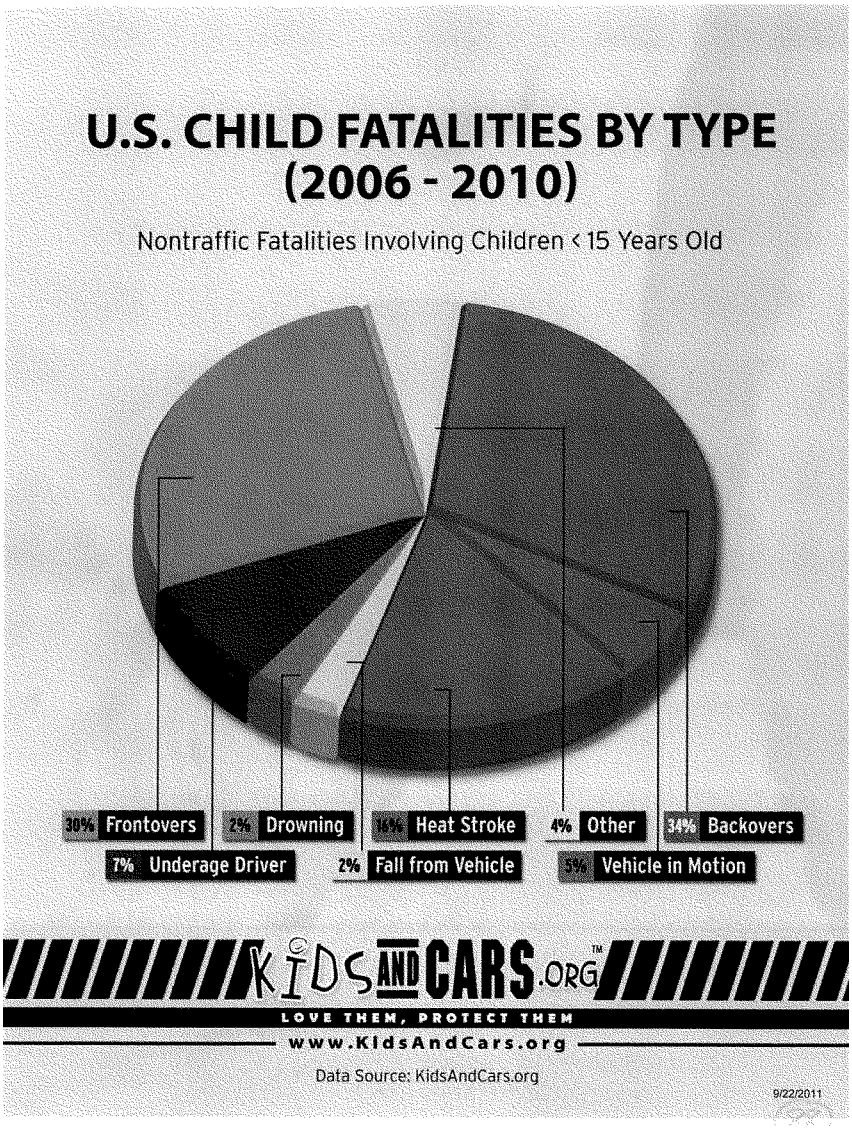
• Keys and/or remote openers should never be left within reach of children.

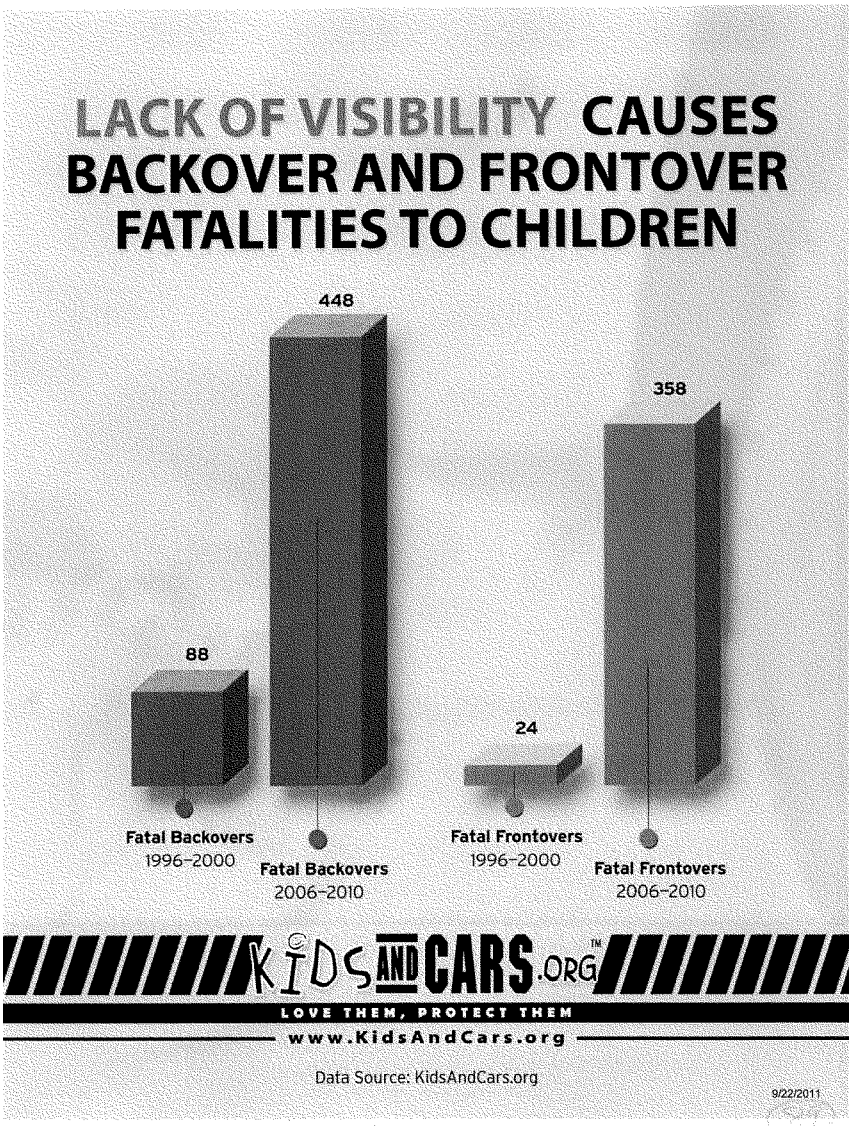
• Make sure all child passengers have left the car after it is parked.

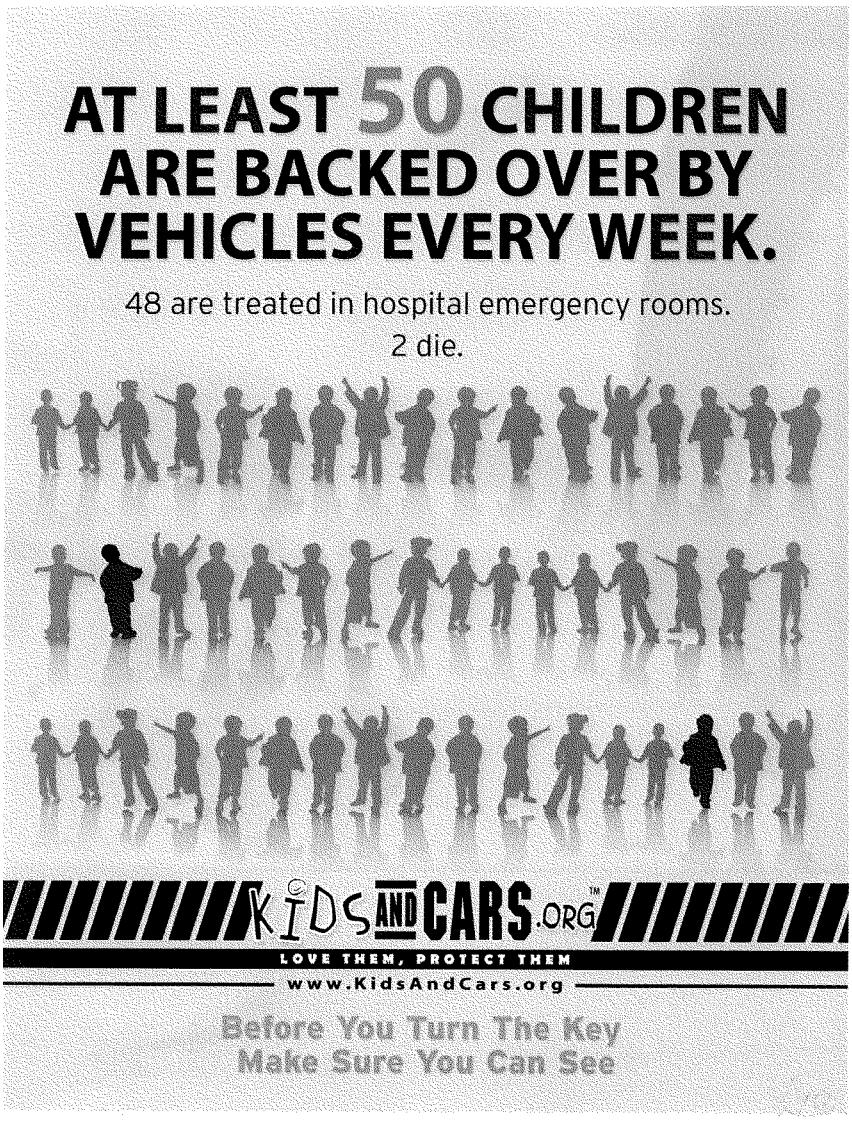
• Be especially careful about keeping children safe in and around cars during busy times, schedule changes and periods of crisis or holidays.

These precautions can save lives. For additional information visit www.KidsAndCars.org

BLINDZONE
up to 50 ft.
up to 8 ft.
KIDS AND CARS.ORG™
LOVE THEM, PROTECT THEM
www.KidsAndCars.org


U.S. CHILD FATALITIES BY TYPE
(2006 - 2010)
Nontraffic Fatalities Involving Children < 15 Years Old
30% Frontovers
2% Drowning
16% Heat Stroke
4% Other
34% Backovers
7% Underage Driver
2% Fall from Vehicle
5% Vehicle in Motion
KIDS AND CARS.ORG™
LOVE THEM, PROTECT THEM
www.KidsAndCars.org
Data Source: KidsAndCars.org
9/22/2011


LACK OF VISIBILITY CAUSES BACKOVER AND FRONTOVER FATALITIES TO CHILDREN
448
358
88
24
Fatal Backovers 1996–2000
Fatal Backovers 2006–2010
Fatal Frontovers 1996–2000
Fatal Frontovers 2006–2010
KIDS AND CARS.ORG™
LOVE THEM, PROTECT THEM
www.KidsAndCars.org
Data Source: KidsAndCars.org
9/22/2011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QUESTIONS SUBMITTED BY SENATOR BLUMENTHAL FOR RENA STEINZOR

QUESTIONS FOR "JUSTICE DELAYED"

FROM SENATOR BLUMENTHAL
For Rena Steinzor

OIRA and Howard Shelanski

Howard Shelanski was confirmed as the new Administrator of the Office of Information and Regulatory Affairs on June 27. He said repeatedly during his confirmation process that he is committed to reducing backlogs at OIRA. In fact, we have already begun to see results. In May, I wrote a letter to OMB—where OIRA is located—urging the Bureau to release three important rules. One rule—which reduces the amount of arsenic in apple juice—has already been released. Mr. Shelanski seems to be open to fresh ideas and eager to move forward with the important work of his office.

a. **Do you have any suggestions for him as he begins the process of reviewing stalled regulations and identifying the causes of this delay?**

b. **How can Congress, agencies, and other actors assist him in making the OIRA review process more efficient?**

Regulatory Report Card

Dr. McLaughlin mentioned in his testimony that the Mercatus Center has been evaluating rules through a Regulatory Report Card. The Report Card looks to the impact analyses agencies conduct when proposing rules. Many of the criteria seemed highly subjective and it is questionable whether they would actually lead to better rules. In particular, the Report Card places a strong emphasis on cost-benefit analysis. Not only does it evaluate an agency's CBA assessment, but it also looks to whether the agency chose the least-costly regulation and maximized net benefits. This seems to conflict with Congressional intent when we design agency mandates.

a. **You have done a lot of work on the coal ash rule. Can you give me an assessment of the Regulatory Report Card's score on that rule?**

b. **Have you found that the Regulatory Report Card's criteria would lead to better rules?**

c. **How does the Report Card's emphasis on cost-benefit analysis affect agency decision-making when promulgating rules?**

d. **Does the Report Card's emphasis on cost-benefit analysis take into consideration the human costs of unregulated areas?**

Overestimated Costs

Janette Fennell testified about the Department of Transportation's proposed Rear Visibility Rule, which has gotten bogged down in the regulatory process. One of the issues that has come up with the Rear Visibility Rule seems to be a recurring theme in cases of regulatory delay: overestimated costs. The Department of Transportation's initial estimate of the cost of a rearview camera is $200 per unit, amounting to $2.7 billion overall. However, Jackie Gillan, president of the group Advocates for Highway and Auto Safety, has stated that this number is greatly inflated. She argues that the price of these cameras will naturally go down if they are mandated and their use becomes more widespread.

a. **Is it typical to not take into account the fact that the cost of a rule may decline as the rule is implemented?**

b. **Could this have an impact on cost-benefit analysis?**

Key Benefits Ignored

Ms. Fennell's testimony raised an issue that really struck me. When they estimate the costs and benefits of a rule, agencies are expected to calculate the dollar value of a life. Putting aside for a second whether we can appropriately and accurately put a dollar value on life, what strikes me is what gets ignored in this calculation.

One of the main harms that could be addressed by the Rear Visibility Rule that Ms. Fennell spoke about is the risk that parents will accidentally back over their own children. Apparently 99 of the more than 220 people killed last year in backovers were children, and most of the time they were backed over by their own parents. Yet the mental anguish of a parent who has just accidentally killed their own child is not considered when agencies decide whether to address this problem.

a. **In your experience, are costs like this frequently ignored? Does this have an impact on the regulatory process?**

b. **If these costs lead to tangible, economic harms—like depressed parents seeking counseling, dropping out of the workforce, or engaging in destructive behavior—are those costs still ignored?**

The Distributive Impact of Regulation

In his submitted testimony, Dr. McLaughlin wrote about the disproportionate negative effect of regulations on low-income populations. However, you made a compelling argument in your testimony regarding the astronomical costs of healthcare that workers face when they become injured or ill due to unregulated hazards in the workplace. Half of these costs are borne by workers and nearly a third are shifted to society as a whole in the form of public benefits and private health insurance.

a. **As a general rule, have you found that regulations have a regressive effect that harms low-income populations?**

b. **Your testimony also mentioned the disproportionate risks faced by Latino and foreign-borne workers. Can you say a bit about the impact of regulatory delay on these groups?**

Is Government Regulating More Rapidly?

Mr. McLaughlin and Mr. Batkins suggest in their testimony that the rate at which agencies issue rules has been skyrocketing. They have provided some statistics, but those statistics look at things like the number of pages in a rule or the number of words—not the factors that would tell us whether we are really seeing more stringent regulations. Senator Whitehouse pointed out at the hearing that regulations typically are not removed from the record, but instead, we replace them with new ones that are enforced. As Dr. McLaughlin conceded, counting the number of pages in the federal record can be deceiving since defunct regulations would be part of that calculation.

a. **Based on your experience, do you believe we are seeing more rapid regulation?**

Amending Proposed Rules

Professor Steinzor mentioned in the hearing that the Rear-View Visibility rule has been delayed in part because OIRA has requested that NHSTA withdraw the rule. It is appropriate to send rules back that need further analysis and amendments, but they should not unnecessarily be stuck in a cycle of OIRA review.

a. **When rules are sent back or OIRA requests that they be withdrawn, do agencies amend them and try again?**

b. **What types of changes are typically incorporated when proposed rules are amended for a second-look from OIRA? What impact do these changes have on the strength of the rule?**

Industry Capture

Ms. Seminario told a compelling story during the hearing concerning a meeting of workers and families who had lost loved ones due to workplace injuries and illnesses with OIRA Administrator Sunstein to talk about the delay in worker health and safety rules. You related Mr. Sunstein's comment that this was a very unusual meeting since average citizens and workers didn't ask to meet with OIRA, and that most meetings were with industry.

a. **What impact, if any, does industry capture have on regulatory delay?**

b. **How does industry end up with more meetings with OIRA than public interest groups and do you have any suggestions for how to change to this?**

Judicial Review

When identifying causes of regulatory delay, many experts cite the burdens of judicial review on agency action. This can come in the form of years of litigation as industry challenges rules, the striking down of rules, and new burdens placed on agencies when promulgating rules.

a. **What impact, if any, does judicial review have on rulemaking?**

QUESTIONS SUBMITTED BY SENATOR BLUMENTHAL FOR PEG SEMINARIO

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FROM SENATOR BLUMENTHAL
For Peg Seminario

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QUESTIONS SUBMITTED BY SENATOR KLOBUCHAR FOR RENA STEINZOR

QUESTIONS FOR THE RECORD

From Senator Amy Klobuchar

"Justice Delayed: The Human Cost of Regulatory Paralysis"

August 1, 2013

Questions for Rena Steinzor

1. The Office of Information and Regulatory Affairs' (OIRA) key analytical tool is a "cost benefit analysis," which requires the Office to weigh economic costs against benefits that can be more difficult to measure. This kind of exercise may require agencies to expend significant resources to build a record that ultimately may not even be capable of adequately quantifying the "benefits" at issue. Is this the best analytical tool OIRA can reach for? Why or why not? What analytical tools could OIRA use that would be less burdensome to agencies and that would yield results that more closely approximate the real policy calculus the government is trying to make?

2. The Administrative Procedure Act and other statutes allow courts to reject certain regulatory actions that they consider "arbitrary [and] capricious." Some people argue that the availability of judicial review for administrative rules has allowed private parties to game the system to slow down or even reverse the will of Congress. Do you think this dynamic is a significant problem?

3. Although there can be significant costs of delayed or insufficient regulation, there can also be costs associated with excessive, contradictory, or duplicative regulation. What mechanism could we used to efficiently identify and weed out these kinds of regulations that are harmful to society?

RESPONSES OF RENA STEINZOR TO QUESTIONS SUBMITTED BY SENATORS BLUMENTHAL AND KLOBUCHAR

Rena Steinzor
U.S. Senate, Judiciary, Subcommittee on Oversight, Federal Rights, and Agency Action
Justice Delayed: The Human Cost of Regulatory Paralysis, August 1, 2013

ANSWERS TO QUESTIONS POSED BY SUBCOMMITTEE MEMBERS

Questions from Senator Whitehouse

Howard Shelanski was confirmed as the new Administrator of the Office of Information and Regulatory Affairs on June 27. He said repeatedly during his confirmation process that he is committed to reducing backlogs at OIRA. In fact, we have already begun to see results. In May, I wrote a letter to OMB—where OIRA is located—urging the Bureau to release three important rules. One rule—which reduces the amount of arsenic in apple juice—has already been released. Mr. Shelanski seems to be open to fresh ideas and eager to move forward with the important work of his office.

a. Do you have any suggestions for him as he begins the process of reviewing stalled regulations and identifying the causes of this delay?

As a preliminary matter, I do not endorse OIRA review of regulations. The problems it creates far outweigh any benefits it might yield in terms of improved decision-making. I recognize, however, that the institution of centralized review that OIRA oversees will remain in place for the foreseeable future. Bearing that in mind, there are ways that OIRA's review processes can be improved to reduce the negative impacts it has on the effective functioning of the regulatory system. By taking the following three steps, Administrator Shelanski can help to mitigate the problem of persistent OIRA delays.

First, OIRA should limits reviews to just rules that meet the definition of being "economically significant." In fact, Executive Order 12866 instructs OIRA to focus on these "economically significant" rules, generally defined as rules imposing more than $100 million in annual compliance costs for affected industries. The order also allows OIRA to extend the scope of its review in very limited circumstances: for example, with respect to rules that interfere with other agencies' work, materially change entitlement programs, or present "novel" legal or policy issues. But this exception has proved unworkable, as OIRA has routinely ignored these limits, extending its reach into every corner of the EPA's and other agencies' work. While OIRA reviews approximately 500 to 700 rules each year, only about 100 are economically significant, with the remainder supposedly falling under the limited exceptions of Executive Order 12866. Or, in other words, "non-economically significant rules" are reviewed at a ratio of six to one with the rules that should be the primary focus of OIRA's work.

Similarly, OIRA should end its practice of reviewing agency guidance documents. These are not rules, and thus are not even covered by Executive Order 12866. (The Obama Administration did issue an obscure memorandum soon after coming into office asserting review authority over agency guidance documents.) These documents benefit industry by reducing regulatory uncertainty, and thus should not be subjected to unnecessary delay. Nevertheless, OIRA review has delayed several important guidance documents, including currently the EPA's guidance document clarifying the scope of the Clean Water Act with respect to wetlands and other inland water bodies.

Second, OIRA should confine its reviews to either facilitating interagency coordination on particular rules or offering constructive criticism on agency's economic analyses. By facilitating interagency coordination, I mean that OIRA should help agencies to ensure that their rules don't overlap with those of other agencies or don't produce gaps in protections—such as those that led to the West, Texas, fertilizer explosions. I do not mean that OIRA should enable one agency to protect its constituent's interests by trumping the regulatory decision-making of another. (For example, the Department of Energy should not be permitted to block EPA rules that are opposed by the fossil fueled power plants that certain Department of Energy offices seek to promote.) On economic analyses, OIRA should limit itself to double-checking an agency's work to ensure that no huge mistakes have been made. Under no circumstances should OIRA seek to nitpick these analyses with the effect of zeroing out regulatory benefits while exaggerating regulatory costs. OIRA has employed these practices in the past in order to blog needed safeguards.

It is likewise important that OIRA not seek to interfere in matters beyond its limited expertise on economic issues. In the past, OIRA has sought to substitute its judgment on complex scientific, medical, and other technical matters for those of the expert agencies. For example, OIRA has routinely sought to interfere in EPA scientific assessments underlying the agency's Integrated Risk Information System program. This practice may stop.

Third, OIRA should stop meeting without side groups during rule reviews. The Center for Progressive Reform conducted an exhaustive study of the corrosive effects these reviews can have. This study is available here: http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf. One of the study's findings is that meetings with outside groups leads to longer review times at OIRA. These meetings weaken the quality of reviews since they are highly biased toward advancing industry interests, they are not adequately transparent, and they are duplicative of other public participation processes already available in the rulemaking process, including the solicitation and consideration of public comments on regulatory proposals.

b. How can Congress, agencies, and other actors assist him in making the OIRA review process more efficient?

Congress must conduct more thorough oversight of OIRA's activities, particularly with respect to whether OIRA is following the requirements of the executive orders that guide its activities. I would especially encourage those committees with substantive jurisdiction over the rulemaking activities of agencies (for example, the Senate Environment and Public Works Committee with respect to the EPA) to conduct thorough oversight of OIRA's interference with specific rulemaking activities. Ultimately, OIRA interference undermines the ability of the EPA and other regulatory agencies to carry out their statutory missions. The committees of substantive jurisdiction have an important role to play in ensuring that these statutory missions are being fulfilled and to investigate when those missions are not being fulfilled because of OIRA interference.

A longer term solution would be to amend the Administrative Procedure Act (APA) to ensure that presidential executive orders affecting administrative process (*i.e.*, Executive Order 12866) are designed to be consistent with the APA. The APA sets up a framework for the administrative

process that emphasizes rulemaking based on agency expertise on scientific and other technical matters, adherence to the requirements of applicable organic statutes authorizing rulemakings, and transparency at every step in the rulemaking process. Executive Order 12866 runs directly counter to these principles. It prioritizes OIRA's crabbed economic analysis over agency expertise, it elevates cost-benefit analysis over agencies' organic statutes, and it enables OIRA to meet with politically well-connected interests to weaken or block agency rules behind closed doors.

Dr. McLaughlin mentioned in his testimony that the Mercatus Center has been evaluating rules through a Regulatory Report Card. The Report Card looks to the impact analyses agencies conduct when proposing rules. Many of the criteria seemed highly subjective and it is questionable whether they would actually lead to better rules. In particular, the Report Card places a strong emphasis on cost-benefit analysis. Not only does it evaluate an agency's CBA assessment, but it also looks to whether the agency chose the least-costly regulation and maximized net benefits. This seems to conflict with Congressional intent when we design agency mandates.

a. You have done a lot of work on the coal ash rule. Can you give me an assessment of the Regulatory Report Card's score on that rule?

Unfortunately, I am unimpressed by the Mercatus analysis of the coal ash rule because it appears to have been written without the benefit of a close study—or even a careful reading—of the EPA coal ash proposal. For example, Mercatus says that EPA's analysis would have benefited from greater clarity on how the subtitle C proposal would reduce pollution caused when poorly designed coal ash ponds leak into groundwater. But EPA did present an extensive analysis of those issues, pointing out, with significant support, that storing coal ash in a modern landfill with a liner and a leak detection system would great enhance the chances that such leeching would be prevented.

b. Have you found that the Regulatory Report Card's criteria would lead to better rules?

No, I have not. The Report Card is a one-way street—it always argues against the imposition of rules, and never considers when they might be helpful. Because of this strong bias against regulatory controls, the Report Card's clear intention is to undercut rules as opposed to enhancing their effectiveness.

c. How does the Report Card's emphasis on cost-benefit analysis affect agency decision-making when promulgating rules?

Cost-benefit analysis as practiced in agencies today underestimates benefits and overestimates costs. Because it is, in practice, an instrument biased against protective rules and because it has become a convoluted exercise that takes many months—and often years—to complete, it frustrates good policies that are often mandated by statute.

d. Does the Report Card's emphasis on cost-benefit analysis take into consideration the human costs of unregulated areas?

The Report Card does not acknowledge problems with cost-benefit analysis, pays scant attention to the benefits side of the equation, and therefore systematically overlooks the human costs of decisions not to regulate.

Janette Fennell testified about the Department of Transportation's proposed Rear Visibility Rule, which has gotten bogged down in the regulatory process. One of the issues that has come up with the Rear Visibility Rule seems to be a recurring theme in cases of regulatory delay: overestimated costs. The Department of Transportation's initial estimate of the cost of a rearview camera is $200 per unit, amounting to $2.7 billion overall. However, Jackie Gillan, president of the group Advocates for Highway and Auto Safety, has stated that this number is greatly inflated. She argues that the price of these cameras will naturally go down if they are mandated and their use becomes more widespread.

a. Is it typical to not take into account the fact that the cost of a rule may decline as the rule is implemented?

The *ex ante* cost estimates that agencies use in cost-benefit analysis systematically overstate the actual costs that rules impose. This occurs for several reasons.

To generate these cost estimates, agencies primarily rely on surveys of representative companies that the regulation will likely affect. Because companies know the purpose of the surveys, they have a strong incentive to overstate costs in order to skew the final cost-benefit analysis toward weaker regulatory standards.[1] Agencies must also fill in any data gaps they encounter by making various assumptions. Due to fear of litigation over the regulation, they tend to adopt conservative assumptions about regulatory costs, such that the cost assessment ends up reflecting the maximum possible cost, rather than the mean.[2]

Industry cost estimates—and therefore the cost estimates that agencies develop—also do not account for technological innovations that reduce the cost of compliance and produce non-regulatory co-benefits, such as increased productivity. When companies are asked to predict which technology they will employ to comply with a particular environmental regulation, they often will point to the most expensive existing "off-the-shelf" technology available. Once the regulation actually goes into effect, however, companies have a strong incentive to invent or purchase less costly technologies to come into regulatory compliance. As a result, compliance costs tend to be less, and often much less, than the predicted costs. Moreover, the technological innovations tend to produce co-benefits unrelated to the regulation—such as increased productivity and efficiency—that the company strives to achieve in any event. Given these co-

[1] Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2011, 2044-45 (2002).
[2] *Id.* at 2046.

benefits, only a portion of the innovative technology's costs can fairly be counted as compliance costs.[3]

As the following chart indicates, retrospective studies of regulatory costs find that the initial cost estimates are often too high.

[3] *Id.* at 2049-50. Studies of OSHA's vinyl chloride and cotton dust standards concluded that actual compliance costs were much lower than predicted costs in part because of overall productivity gains achieved by regulatees. When company scientists and engineers were forced to concentrate on cost-effective compliance techniques, they also identified ways to improve the overall productivity of an industrial process, or even an entire industry. *See* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, OFFICE OF PROGRAM EVALUATION, REGULATORY REVIEW OF OSHA'S COTTON DUST STANDARD (2000) (identifying extensive technological improvements and increased productivity in the textile industry spurred by OSHA's cotton dust standard); RUTH RUTTENBERG, REGULATION IS THE MOTHER OF INVENTION 42, 44-45 (Working Papers for a New Society, May/June 1981), (identifying six regulation-induced changes in the vinyl chloride industry that resulted in increased productivity).

Retrospective Studies of Regulatory Costs

Study	Subject of Cost Estimates	Results
PHB, 1980[4]	Sector level capital expenditures for pollution controls	– EPA overestimated capital costs more than it underestimated them, with forecasts ranging 26 to 126% above reported expenditures
OTA, 1995[5]	Total, annual, or capital expenditures for occupational safety & health regulations	– OSHA overestimated costs for 4 of 5 health regulations, with forecasts ranging from $5.4 million to $722 million above reported expenditures
Goodstein & Hedges, 1997[6]	Various measures of cost for pollution prevention	– Agency and industry overestimated costs for 24 of 24 OSHA & EPA regulations, by at least 30% and generally by more than 100%
Resources for the Future, 1999[7]	Various measures of cost for environmental regulations	– Agency overestimated costs for 12 of 25 rules, and underestimated costs for 2 rules

Agencies can and should do better at generating *ex ante* cost estimates to account for all of these factors that lead to their systematic overstatement, and this is an area where OIRA's centralized review could actually improve agency decision-making. OIRA is uniquely well situated to study the problem of regulatory cost overestimates and to help guide agencies to develop more accurate estimates. This subcommittee should urge OIRA to examine this problem and to help develop meaningful solutions.

b. Could this have an impact on cost-benefit analysis?

Yes, the systematic overestimate of costs leads to skewed cost-benefit analysis results that inaccurately portray needed safeguards as a drain on society. This problem is further compounded by the fact that cost-benefit analysis suffers from several methodological flaws that lead to systematic under-estimates of regulatory benefits. In short, cost-benefit analyses typically involve overstated costs and understated benefits. As a result, cost-benefit analysis

[4] Winston Harrington, Richard D. Morgenstern, & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates* 6 (Resources for the Future, Discussion Paper 99-18, 1999) (citing PUTNAM, HAYES, & BARTLETT, INC., COMPARISONS OF ESTIMATED AND ACTUAL POLLUTION CONTROL CAPITAL EXPENDITURES FOR SELECTED INDUSTRIES (Report prepared for the Office of Planning & Evaluation, U.S. Envtl. Protection Agency, 1980)), *available at* http://www.rff.org/documents/RFF-DP-99-18.pdf.

[5] OFFICE OF TECHNOLOGY ASSESSMENT, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH 58 (1995).

[6] Eban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, 8 AM. PROSPECT 64 (Nov./Dec. 1997).

[7] Harrington, Morgenstern, & Nelson, *supra* endnote 27. The Resources for the Future study notes that actual compliance costs can also be less than an agency estimates because there can be less regulatory compliance than the agency anticipates. If an agency overestimates the extent of pollution reduction, or some similar benefit, then the regulation may cost less than the agency estimates. In such cases, the original agency estimate might have been accurate, but it turns out to be wrong because the regulatory industry does not obey the regulation to the extent that the agency predicted. *Id.* at 14-15.

invariably distorts the true value of regulations—one that is heavily skewed against effective regulations—which is precisely why those opposed to regulations support the use of cost-benefit analysis.

The systematic overestimate of regulatory costs is especially problematic, because the results of cost-benefit analysis play an unduly influential role in regulatory decision-making. Former OIRA Administrator Cass Sunstein stated in his recent book that, under his leadership, OIRA by and large would not approve a rule if it did not pass a cost-benefit analysis test—that is, if the rule's benefits did not "justify" its costs. As noted above, this test is stacked heavily against effective regulations, because it trades on a methodology that overstates costs and understates benefits. As a result, appropriately strong rules are prevented from passing this test. Instead, agencies must resort to drafting weaker rules to improve their chances of passing the cost-benefit analysis test, which leaves people and the environment inadequately protected.

Ms. Fennell's testimony raised an issue that really struck me. When they estimate the costs and benefits of a rule, agencies are expected to calculate the dollar value of a life. Putting aside for a second whether we can appropriately and accurately put a dollar value on life, what strikes me is what gets ignored in this calculation.

One of the main harms that could be addressed by the Rear Visibility Rule that Ms. Fennell spoke about is the risk that parents will accidentally back over their own children. Apparently 99 of the more than 220 people killed last year in backovers were children, and most of the time they were backed over by their own parents. Yet the mental anguish of a parent who has just accidentally killed their own child is not considered when agencies decide whether to address this problem.

a. In your experience, are costs like this frequently ignored? Does this have an impact on the regulatory process?

I would put this problem a little differently. The goal of cost-benefit analysis is to produce a comparison of all the costs and all of the benefits of a particular regulation in order to identify the most "efficient" regulatory option (*i.e.*, the regulatory option that produces the greatest net benefits). Generally, the task of quantifying and assigning a monetary value to the cost that a rule imposes on regulated industry is much more straightforward (though, as noted above, methodological flaws lead to systematic overestimates of these costs). The bigger problem comes with efforts to calculate regulatory benefits. In many cases, a particular type of benefit cannot be quantified (*e.g.*, we don't know how many fish the EPA's cooling water intake rule for power plants will save) and/or it cannot be monetized (*e.g.*, even if we know many fish the EPA's cooling water intake rule will save, we don't know how to assign a meaningful monetary value to saving those fish). In this case, the benefit isn't simply ignored—it's arbitrarily assigned a value of $0. We know there is a benefit, but we just don't know how to state it in the language of cost-benefit analysis. The cost-benefit analyst could respond to this problem in any number of ways. He could, for example, make up a monetary value—$1 million perhaps (which is no less arbitrary than $0 and undoubtedly closer to the "right" answer)—and employ that value in the cost-benefit analysis. But cost-benefit analysis does not follow this approach. Instead, it

treats all unquantifiable and all un-monetizable benefits as worth $0. Needless to say, this helps contribute to the huge systematic underestimate of regulatory benefits I described above.

As also noted above, the systematic underestimate of regulatory benefits contributes to skewed cost-benefit analysis results, which in turn leads agencies to develop inadequately weak rules.

b. If these costs lead to tangible, economic harms—like depressed parents seeking counseling, dropping out of the workforce, or engaging in destructive behavior—are those costs still ignored?

There's no question that cost-benefit analysis routinely fails to account for benefits that involve real economic costs. This is true of the example you give of depressed parents seeking counseling, etc., as well as of protecting fish that have some indiscernible economic value from being killed in power plants' cooling water intake structures. Likewise, cost-benefit analysis techniques routinely fail to account for benefits that transcend monetary values, such as avoiding the anguish a parent feels when he or she is responsible for his own child's death. In either case, if a cost-benefit analyst cannot devise a plausible method for quantifying and monetizing this benefit, it is treated as having a value of only $0.

In his submitted testimony, Dr. McLaughlin wrote about the disproportionate negative effect of regulations on low-income populations. However, Ms. Seminario made a compelling argument in her testimony regarding the astronomical costs of healthcare that workers face when they become injured or ill due to unregulated hazards in the workplace. Half of these costs are borne by workers and nearly a third are shifted to society as a whole in the form of public benefits and private health insurance.

a. As a general rule, have you found that regulations have a regressive effect that harms low-income populations?

To the contrary, regulations often have a disproportionately beneficial effect on low-income populations. Consider, for example, regulations that address hazardous air pollutants from power plants or refineries. These air pollutants primarily harm the "fenceline communities" that live adjacent to these facilities. These communities in turn are primarily populated by lower income individuals and people of color. In short, the benefits of addressing hazardous pollutants from these plants would fall primarily on these fenceline communities. I take it that Dr. McLaughlin point is that the costs of generating these benefits would be passed on as higher prices of goods (*e.g.*, through higher electricity prices or higher gas prices), and that these higher prices will disproportionately harm low-income populations. Even if Dr. McLaughlin's correct about regulations raising prices, his view is fundamentally incomplete and therefore misleading, because it ignores all the benefits that would flow to these communities as a result of these regulatory safeguards. With cleaner air, these individuals would have lower medical costs and experience fewer missed work days and school days. With improved health, these individuals could seek out better, higher paying jobs. And so on. Dr. McLaughlin's crabbed view is that regulations inevitably restrict individual freedom. My view, as illustrated above, is that the benefits that regulations produce can be freedom-enhancing, especially for low-income populations.

Mr. McLaughlin and Mr. Batkins suggest in their testimony that the rate at which agencies issue rules has been skyrocketing. They have provided some statistics, but those statistics look at things like the number of pages in a rule or the number of words—not the factors that would tell us whether we are really seeing more stringent regulations. Senator Whitehouse pointed out at the hearing that regulations typically are not removed from the record, but instead, we replace them with new ones that are enforced. As Dr. McLaughlin conceded, counting the number of pages in the federal record can be deceiving since defunct regulations would be part of that calculation.

a. Based on your experience, do you believe we are seeing more rapid regulation?

As I noted in my testimony, the regulatory process has grinded to a virtual halt during the last decade or so. As Ms. Seminario noted in her testimony, OSHA has finished only two real regulations of note during the Obama Administration—and both had been initiated prior to Obama assuming office. In my testimony, I examined eight pending rulemakings at EPA that have been subject persistent and unnecessary delays. Given all of the available evidence, it is difficult to take seriously the claim that the Obama Administration is unleashing anything like a "regulatory tsunami."

If anything, the regulatory process is moving too slowly, undermining the ability of agencies to respond effectively to new and emerging threats to public health, safety, and the environment. Congress and the Obama Administration need to examine carefully the causes of this regulatory delay and adopt reforms to help eliminate it. As I explained above, reforming the way OIRA conducts centralized review would be a fruitful place to begin this examination.

You mentioned in the hearing that the Rear-View Visibility rule has been delayed in part because OIRA has requested that NHSTA withdraw the rule. It is appropriate to send rules back that need further analysis and amendments, but they should not unnecessarily be stuck in a cycle of OIRA review.

a. When rules are sent back or OIRA requests that they be withdrawn, do agencies amend them and try again?

It's not clear what happens to rules after they are "withdrawn," because this process is completely lacking in transparency. It's possible that OIRA could ask an agency to withdraw a rule, not to fix any defects in the rule, but just so that it is no longer on OIRA's docket with the clock ticking. In other words, this may be a tactic that OIRA uses to avoid having too many rules stuck there beyond the 120-day limit permitted under Executive Order 12866. Later, the agency may be invited by OIRA to resubmit the rule, unchanged to OIRA to resume review.

The issue of "withdrawn" rules is one that merits further attention by this committee. In theory, there are two ways that an OIRA review can end prematurely without formal OIRA approval. First, OIRA can "return" the rule to the agency. This process is more transparent, because OIRA must issue a letter explaining why the draft rule was returned to the agency. In other words, OIRA must make clear what problems arose during OIRA review that could not be resolved.

The Obama Administration has largely avoided the use of return letters using it only once when it rejected the EPA's draft final rule to set a new national ozone standard. Instead, the Obama Administration has preferred to rely on the second process for prematurely ending a rule: withdrawal. In theory, an agency withdraws its own rule of its own volition, because it discovers some problem with the rule during the review that must be corrected before review can resume. In practice, the withdrawal process appears to have functioned as a less transparent "return" during the Obama Administration. In other words, it appears that the Obama Administration has frequently directed an agency head to "choose" to withdraw a rule. This end-run around the return letter allows the White House to send a rule back to the agency quietly and with no public explanation for the reason that the OIRA review ended prematurely. This is likely what transpired when the Department of Transportation "withdrew" the Rear-View Visibility rule.

I would urge this subcommittee to press the Obama Administration to refrain from relying on the withdrawal process to prematurely end OIRA review. Alternatively, this subcommittee should press the Obama Administration to issue a public statement when a rule is withdrawn explaining the reasons for the withdrawal, so that the process is at least as transparent as the return process.

b. What types of changes are typically incorporated when proposed rules are amended for a second-look from OIRA? What impact do these changes have on the strength of the rule?

As noted above, the process for withdrawals is not transparent (much like virtually every aspect of OIRA review), so it is impossible to know what, if any, changes result from it. The available evidence suggests that rules are likely weakened in response to withdrawals.

First, as numerous previous studies have found, OIRA review often operates as a "one-way ratchet" such that rule changes made during OIRA review have served to weaken regulatory safeguards.[8] In part, this is because of industry's successful lobbying efforts to weaken rules, as documented in the CPR study discussed above. In part, this is because of the elevated role that cost-benefit analysis plays in OIRA review, which, as described above, is heavily biased in favor of weaker regulations.

If we assume that the withdrawals are functionally similar to returns, as described above, this would also suggest that the resulting rule changes are in the direction of weaker safeguards. The George W. Bush Administration issued several return letters, and virtually all of them directed the rulemaking agency to make changes to a rule that would result in weaker safeguards.

[8] *See, e.g.*, Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 72-73 (2006) (a survey of top political appointees at EPA under Bush I and Clinton, in which 89 percent of respondents agreed that OIRA never or rarely made changes that would enhance protection of human health or the environment, and often or always made regulations less burdensome for regulated entities); David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLORADO L. REV. 335, 365 (2006) (examining 25 rules identified by the GAO as "significantly changed" by OIRA between June 2001 and July 2002, and concluding that for 24 of the 25 rules, OIRA's suggested changes "would weaken environmental, health, or safety protection").

However, one thing about withdrawals and returns is clear: They both often result in significant rulemaking delays—delays that impose unacceptable costs on people and the environment. For example, in September of 2011 the Obama Administration issued a return letter on the EPA's draft final rule, which would have strengthened the national ozone standards. Here we are almost two years later, and no new final rule to strengthen the national ozone standards is on the horizon. As I noted in my testimony, any final rule is unlikely to be released until sometime in 2015. In short, Obama's return letter precipitated at least a four-year delay for this critical rulemaking.

Ms. Seminario told a compelling story during the hearing concerning a meeting with OIRA Administrator Sunstein on a silica rule. She described Mr. Sunstein's surprise that he was meeting with health and safety representatives rather than industry.

a. What impact, if any, does industry capture have on regulatory delay?

There is no question that industry has captured OIRA and that industry's dominance of OIRA review is a significant contributor to regulatory delay. CPR's study on industry lobbying of OIRA, referred to above, found that industry overwhelmingly dominates the OIRA review process: Industry groups participating in the meeting process outnumber public interest groups by a ratio of 4.5 to 1. Of those OIRA reviews that involved meetings with outside groups, fully 73 percent involved meetings with industry representatives only (*i.e.*, OIRA did not meet with any public interest representatives regarding these reviews). In contrast, only 16 percent involved meetings with outside groups from across the spectrum of "stakeholders" (*i.e.*, both industry and public interest representatives).

Moreover, the CPR study finds that those reviews that were the subject of meetings with outside lobbyists tended to be longer than those reviews during which OIRA held no meetings with outside lobbyists. One remarkable example of this dynamic was OIRA's review of the EPA's draft proposed coal ash rule. The review for this rule lasted well over six months—far beyond the 120-day maximum permitted by Executive Order 12866—as OIRA hosted nearly 50 meetings with outside groups on the rule, the vast majority of which involved various industry groups opposed to the rule.

But the problem goes beyond OIRA. I would say industry interests have also captured much of the rulemaking process—in the sense that they have distorted this process so that it works in their favor and against the public interest. Perhaps the most notable example of this dynamic is how industry has effectively hijacked the notice-and-comment process. Notice-and-comment was introduced into rulemaking to ensure that the voice of the public interest was heard. Industry, though, has leveraged its vast resources to dominate this process so completely that it works against the public interest. My colleague Prof. Wendy Wagner has documented how industry's participation rate in the public comment process is far greater than that of public interest groups. She also explains how industry has taken advantage of what she calls "filter failure"—or tricks that industry employs to literally inundate agencies with information, regardless of whether this information is useful or duplicative. The result is that agencies are overwhelmed with too much information, and thus are delayed from making decisions or are bullied into making decisions that favor regulated interests. Because of their limited resources, public interest groups cannot

respond to this information, and their voice ends up being drowned out in the notice-and-comment process.

In all of these various ways, the rulemaking process does not work for the public interest anymore—it has been captured by industry. I urge this subcommittee to work with the Obama Administration to identify and institute reforms that will help level the playing field, so that the regulatory system is better able to advance the public interest.

b. How does industry end up with more meetings with OIRA than public interest groups and do you have any suggestions for how to change to this?

OIRA operates under what it calls an "open door policy" in which it generally will accept any meeting request it receives. OIRA facilely asserts that this policy is neutral, but, as the statistics cited above reveal, regulated industry is able to take advantage of the vast resource disparity it enjoys over public interest groups and overwhelm OIRA staff with meetings. Industry continues to lobby OIRA at such high rates, because it works. As noted above, reviews that are the subject of meetings tend to last longer than those without meetings. (These delays in turn translate into money saved for industry.) Moreover, a rule is more likely to be changed if OIRA meets with outside groups during the review, and, as the past studies cited above confirm, these changes often result in weaker rules that benefit regulated industry at the expense of the public interest.

The only surefire way to prevent industry lobbyists from dominating OIRA would be for OIRA to stop meeting with outside groups as part of its review process. OIRA should instead base the evaluations it performs during the review process on input from agency staff and, if necessary, review of the ample comments in the rulemaking record. The agency process of reviewing public comments is the appropriate venue for outside parties to make their case about how best to enforce the nation's laws via regulation. Unlike OIRA review, the public comment process is required to be transparent under the APA, and industry's arguments in the public comment process must at least in theory be grounded in either the law or in any relevant science. In contrast, OIRA review is not transparent, and nothing prevents industry from relying on irrelevant factors—such as petty politics—to make the case for weakening regulatory safeguards.

I recognize that this essential reform is unlikely to come to fruition in the near future. So, if OIRA continues to meet with outside parties, it should at least assume an active role in balancing the participation, whether through consolidating meetings with likeminded participants (*i.e.*, seeing them all at once), reaching out to the relevant public interest groups to encourage their input, or both.

When identifying causes of regulatory delay, many experts cite the burdens of judicial review on agency action. This can come in the form of years of litigation as industry challenges rules, the striking down of rules, and new burdens placed on agencies when promulgating rules.

a. What impact, if any, does judicial review have on rulemaking?

Judicial review adds to the expense and length of rulemaking. Agencies expect that almost any rulemaking of any consequence will be subjected to challenge in the courts, and, since

implementation of the challenged rule is stayed until the litigation is complete, this process effectively adds several years to the rulemaking process (even assuming the rule is not struck down or remanded to the agency). This process is expensive for agencies and diverts their limited resources from pursuing other elements of their statutory mission. (Of course, this process is also expensive for regulated industries. Nevertheless, they still have strong incentives to pursue litigation as a matter of course, because the resulting delays save regulated industries even more money on balance.)

Industry abuse of judicial review can also have a destructive chilling effect on how agencies develop regulations. For one thing, agencies draft weaker rules than they might otherwise to avert particularly bruising court battles. For another, agencies face strong incentives to engage in endless rounds of analysis in order to try to make their rules "bulletproof" enough to withstand the brutal judicial review that industry will undoubtedly pursue. This counterproductive dynamic is further aided and abetted by reviewing courts, which generally require that agencies demonstrate that they have considered and respond to every element of every public comment they receive, no matter how mundane or tangentially related. (This judicial review requirement in turn reinforces the "filter failure" problem that I identified above. Industry recognizes the large risks agencies face for failing to adequately respond to their voluminous comments. So, for the relatively small cost of inundating agencies in comments, industry can ensure that agencies remain bogged down with reviewing and responding to all of them—an unhelpful task ultimately geared toward satisfying judicial review requirements rather than producing "high quality" rules.) To be sure, judicial review can and does encourage improved regulatory decision-making. We want agencies to face strong incentives to put out high-quality rules that are consistent with the law and supported by the best available science, and judicial review does provide these strong incentives. However, industry has abused judicial review to such an extent that this once healthy check has transformed into a detrimental source of regulatory delay and dysfunction.

Questions from Senator Klobuchar

1. The Office of Information and Regulatory Affairs' (OIRA) key analytical tool is a "cost benefit analysis," which requires the Office to weigh economic costs against benefits that can be more difficult to measure. This kind of exercise may require agencies to expend significant resources to build a record that ultimately may not even be capable of adequately quantifying the "benefits" at issue. Is this the best analytical tool OIRA can reach for? Why or why not? What analytical tools could OIRA use that would be less burdensome to agencies and that would yield results that more closely approximate the real policy calculus the government is trying to make?

Cost-benefit analysis—as practiced by OIRA—is an inherently flawed means for evaluating the quality of regulations, and its methodological flaws leads it to provide a distorted picture of the real value of regulation—one that is heavily skewed against protective safeguards. In fact, regulatory opponents—including corporate interests and small government ideologues in government—have long embraced cost-benefit analysis precisely because of its strong bias against effective regulations. I would strongly urge OIRA to abandon it overreliance on cost-benefit analysis, and instead restore agencies' statutory standards as the primary guide for evaluating agency decision-making.

Rena Steinzor
U.S. Senate, Judiciary, Subcommittee on Oversight, Federal Rights, and Agency Action
Justice Delayed: The Human Cost of Regulatory Paralysis, August 1, 2013

Cost-benefit analysis provides a distorted view of regulation in two ways. First, it systematically overestimates regulatory costs. To generate cost estimates, agencies primarily rely on surveys of representative companies that the regulation will likely affect. Because companies know the purpose of the surveys, they have a strong incentive to overstate costs in order to skew the final cost-benefit analysis toward weaker regulatory standards.[9] Agencies must also fill in any data gaps they encounter by making various assumptions. Due to fear of litigation over the regulation, they tend to adopt conservative assumptions about regulatory costs, such that the cost assessment ends up reflecting the maximum possible cost, rather than the mean.[10]

Industry cost estimates—and therefore the cost estimates that agencies develop—also do not account for technological innovations that reduce the cost of compliance and produce non-regulatory co-benefits, such as increased productivity. When companies are asked to predict which technology they will employ to comply with a particular environmental regulation, they often will point to the most expensive existing "off-the-shelf" technology available. Once the regulation actually goes into effect, however, companies have a strong incentive to invent or purchase less costly technologies to come into regulatory compliance. As a result, compliance costs tend to be less, and often much less, than the predicted costs. Moreover, the technological innovations tend to produce co-benefits unrelated to the regulation—such as increased productivity and efficiency—that the company strives to achieve in any event. Given these co-benefits, only a portion of the innovative technology's costs can fairly be counted as compliance costs.[11]

As the following chart indicates, retrospective studies of regulatory costs find that the initial cost estimates are often too high.

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[9] Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2011, 2044-45 (2002).
[10] *Id.* at 2046.
[11] *Id.* at 2049-50. Studies of OSHA's vinyl chloride and cotton dust standards concluded that actual compliance costs were much lower than predicted costs in part because of overall productivity gains achieved by regulatees. When company scientists and engineers were forced to concentrate on cost-effective compliance techniques, they also identified ways to improve the overall productivity of an industrial process, or even an entire industry. *See* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, OFFICE OF PROGRAM EVALUATION, REGULATORY REVIEW OF OSHA'S COTTON DUST STANDARD (2000) (identifying extensive technological improvements and increased productivity in the textile industry spurred by OSHA's cotton dust standard); RUTH RUTTENBERG, REGULATION IS THE MOTHER OF INVENTION 42, 44-45 (Working Papers for a New Society, May/June 1981), (identifying six regulation-induced changes in the vinyl chloride industry that resulted in increased productivity).

Retrospective Studies of Regulatory Costs

Study	Subject of Cost Estimates	Results
PHB, 1980[12]	Sector level capital expenditures for pollution controls	- EPA overestimated capital costs more than it underestimated them, with forecasts ranging 26 to 126% above reported expenditures
OTA, 1995[13]	Total, annual, or capital expenditures for occupational safety & health regulations	- OSHA overestimated costs for 4 of 5 health regulations, with forecasts ranging from $5.4 million to $722 million above reported expenditures
Goodstein & Hedges, 1997[14]	Various measures of cost for pollution prevention	- Agency and industry overestimated costs for 24 of 24 OSHA & EPA regulations, by at least 30% and generally by more than 100%
Resources for the Future, 1999[15]	Various measures of cost for environmental regulations	- Agency overestimated costs for 12 of 25 rules, and underestimated costs for 2 rules

Second, cost-benefit analysis systematically underestimates regulatory benefits. In many cases, a particular type of benefit cannot be quantified (*e.g.*, we don't know how many fish the EPA's cooling water intake rule for power plants will save) and/or it cannot be monetized (*e.g.*, even if we know many fish the EPA's cooling water intake rule will save, we don't know how to assign a meaningful monetary value to saving those fish). In this case, the benefit isn't simply ignored—it's arbitrarily assigned a value of $0. We know there is a benefit, but we just don't know how to state it in the language of cost-benefit analysis. The cost-benefit analyst could respond to this problem in any number of ways. He could, for example, make up a monetary value—$1 million perhaps (which is no less arbitrary than $0 and undoubtedly closer to the "right" answer)—and employ that value in the cost-benefit analysis. But cost-benefit analysis does not follow this approach. Instead, it treats all unquantifiable and all un-monetizable benefits as worth $0. Needless to say, this helps contribute to the huge systematic underestimate of regulatory benefits I described above.

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[12] Winston Harrington, Richard D. Morgenstern, & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates* 6 (Resources for the Future, Discussion Paper 99-18, 1999) (citing PUTNAM, HAYES, & BARTLETT, INC., COMPARISONS OF ESTIMATED AND ACTUAL POLLUTION CONTROL CAPITAL EXPENDITURES FOR SELECTED INDUSTRIES (Report prepared for the Office of Planning & Evaluation, U.S. Envtl. Protection Agency, 1980)), *available at* http://www.rff.org/documents/RFF-DP-99-18.pdf.

[13] OFFICE OF TECHNOLOGY ASSESSMENT, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH 58 (1995).

[14] Eban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, 8 AM. PROSPECT 64 (Nov./Dec. 1997).

[15] Harrington, Morgenstern, & Nelson, *supra* endnote 27. The Resources for the Future study notes that actual compliance costs can also be less than an agency estimates because there can be less regulatory compliance than the agency anticipates. If an agency overestimates the extent of pollution reduction, or some similar benefit, then the regulation may cost less than the agency estimates. In such cases, the original agency estimate might have been accurate, but it turns out to be wrong because the regulatory industry does not obey the regulation to the extent that the agency predicted. *Id.* at 14-15.

In addition, many of the benefits that regulations produce involve values that transcend simple dollar-and-cents valuation. These benefits include human life, fairness, equality, diverse and robust ecosystems, etc. Trying to put a dollar figure on these values isn't merely difficult—it raises intractable ethical questions. Generally, though, OIRA and other practitioners of cost-benefit analysis avoid these ethical questions by simply assigning these values a monetary "worth" of $0 in the manner described above.

The bottom line is that a more accurate name for cost-benefit analysis would be "exaggerated costs-incomplete benefits analysis." The biased results it generates are especially problematic, because they play an unduly influential role in regulatory decision-making. Former OIRA Administrator Cass Sunstein stated in his recent book that, under his leadership, OIRA by and large would not approve a rule if it did not pass a cost-benefit analysis test—that is, if the rule's benefits did not "justify" its costs. Under the biased methodology described above, it is difficult for agencies to demonstrate that a rule's benefits justify its costs. As a result, appropriately strong rules are prevented from passing this test. Instead, agencies must resort to drafting weaker rules to improve their chances of passing the cost-benefit analysis test, which leaves people and the environment inadequately protected.

Congress was well aware of the flaws in cost-benefit analysis, and this is why they have largely relied on other approaches to guide agency regulatory decision-making—approaches that are less wasteful of scarce agency resources and that provide a more meaningful benchmark for evaluating regulations. These approaches include the technology-based standards included in many provisions of the Clean Air Act and Clean Water Act, the effects-based standards included in many provisions of the Clean Air Act and Clean Water Act, and the multi-factor balancing standards included in CERCLA and FIFRA. For a summary of these alternative approaches and their relationship to cost-benefit analysis, see this chart:
http://www.progressivereform.org/articles/CPR_RegStandardsChart.pdf

These existing approaches are superior, because they enable agencies to apply their expert analysis to complex technical, scientific, and legal issues that underlie regulatory decision-making, ultimately resulting in higher quality regulations—that is, regulations that are both firmly grounded in the best available science and consistent with applicable law. These approaches also allow for agencies to account for and compare the "pros" and "cons" of various regulatory options, but without the highly stylized quantification and monetization methodologies of cost-benefit analysis that are at best unhelpful and at worst fundamentally misleading.

2. The Administrative Procedure Act and other statutes allow courts to reject certain regulatory actions that they consider "arbitrary [and] capricious." Some people argue that the availability of judicial review for administrative rules has allowed private parties to game the system to slow down or even reverse the will of Congress. Do you think this dynamic is a significant problem?

I would agree that there has been some abuse of judicial review of agency rulemaking by regulated industries, and this abuse adds to the expense and length of rulemaking. In particular,

industry abuse of judicial review can also have a destructive chilling effect on how agencies develop regulations. For one thing, agencies draft weaker rules than they might otherwise to avert particularly bruising court battles. For another, agencies face strong incentives to engage in endless rounds of analysis in order to try to make their rules "bulletproof" enough to withstand the brutal judicial review that industry will undoubtedly pursue.

To be sure, judicial review can and does encourage improved regulatory decision-making. We want agencies to face strong incentives to put out high-quality rules that are consistent with the law and supported by the best available science, and judicial review does provide these strong incentives. However, increased abuse of judicial review by regulated industries risks transforming this once healthy check into a detrimental source of regulatory delay and dysfunction.

3. Although there can be significant costs of delayed or insufficient regulation, there can also be costs associated with excessive, contradictory, or duplicative regulation. What mechanism could we used to efficiently identify and weed out these kinds of regulations that are harmful to society?

I am not opposed to a mechanism for periodically reviewing existing regulations to ensure that they are still fulfilling their intended purpose. It is critical, however, that agencies be provided with adequate resources to undertake these reviews, so that they do not prevent these agencies from responding in a timely and effective manner to new and emerging threats to the public interest.

Of course, there are likely a few examples of existing regulations that have outlived their usefulness. This problem, however, is not as nearly extensive as regulatory opponents portray. More to the point, eliminating these existing regulations will not deliver the economic miracles that regulatory opponents claim.

At this point, the real harm to society comes not from excessive regulation. The real harm comes from inadequate regulation. The regulatory system is supposed to protect people and the environment against unacceptable risks, but inadequate resources and excessive procedural constraints have prevented regulatory agencies from fulfilling this task in a timely and effective manner. Evidence of inadequate regulation and enforcement abounds—from the BP oil spill in the Gulf of Mexico to the Upper Big Branch Mine disaster that claimed the lives of 29 men, from the decaying natural gas pipeline networks running beneath our homes to the growing risk of imported food tainted with salmonella, botulism, or other contaminants showing up on grocery store shelves. It was inadequate regulation of the financial services industry that triggered the current economic recession and left millions unemployed, financially ruined, or both.

If this committee is concerned about the reducing harms to society, then it must focus its efforts on identifying ways to reenergize the regulatory system, so that agencies are better able to carry out the mission of protecting people and the environment that Congress has assigned to them. Congress needs to work with the president to identify the resources that agencies need to carry out their statutory missions, including the development, implementation, and enforcement of

regulations. In addition, Congress and the President each need to identify any unnecessary analytical requirements and procedural constraints that prevent agencies from issuing effective rules in a timely manner. Taking these steps will not be simple, but without them, the U.S. regulatory system will continue to operate in an ad hoc, reactionary fashion, leaving public health, safety, and environmental protection to the whims of the marketplace.

RESPONSES OF PEG SEMINARIO TO QUESTIONS SUBMITTED BY SENATOR BLUMENTHAL

QUESTIONS FOR "JUSTICE DELAYED"

FROM SENATOR BLUMENTHAL
For Peg Seminario

OIRA and Howard Shelanski

Howard Shelanski was confirmed as the new Administrator of the Office of Information and Regulatory Affairs on June 27. He said repeatedly during his confirmation process that he is committed to reducing backlogs at OIRA. In fact, we have already begun to see results. In May, I wrote a letter to OMB—where OIRA is located—urging the Bureau to release three important rules. One rule—which reduces the amount of arsenic in apple juice—has already been released. Mr. Shelanski seems to be open to fresh ideas and eager to move forward with the important work of his office.

a. Do you have any suggestions for him as he begins the process of reviewing stalled regulations and identifying the causes of this delay?

Yes. I have a number of suggestions.

First, Mr. Shelanski should simply follow Executive Order 12866. The EO sets clear deadlines for the review of rules – 90 days for draft proposed and draft final rules with one 30 day extension. In order to meet these deadlines, OIRA should focus its efforts on rules that are economically significant. Over the years OIRA has expanded its reach demanding to review virtually all rules under development by an agency. According to OIRA review statistics, in 2012 OIRA concluded review on 1164 regulatory, only 200 of which were classified as economically significant rules.

Mr. Shelanski should also ensure that OIRA's role is limited to reviewing draft agencies' regulations and analyses to determine whether they comply with the EO. OIRA should not be second guessing agencies' scientific, technical, policy and legal determinations, a practice which has become the norm for many regulations.

b. How can Congress, agencies, and other actors assist him in making the OIRA review process more efficient?

Congress can provide continuing oversight on OIRA review practices to ensure that reviews are proceeding in a timely manner. Congress should also request regular reports from both agencies and OIRA on the status of important rules, along with timetables for when the various steps of the rulemaking are anticipated to be reached (e.g. ANPRM issued, draft proposal submitted for OIRA review, proposed rule issued, draft final submitted for OIRA review and final rule issued).

Overestimated Costs

Janette Fennell testified about the Department of Transportation's proposed Rear Visibility Rule, which has gotten bogged down in the regulatory process. One of the issues that has come up with the Rear Visibility Rule seems to be a recurring theme in cases of regulatory delay: overestimated costs. The Department of Transportation's initial estimate of the cost of a rearview camera is $200 per unit, amounting to $2.7 billion overall. However, Jackie Gillan, president of the group Advocates for Highway and Auto Safety, has stated that this number is greatly inflated. She argues that the price of these cameras will naturally go down if they are mandated and their use becomes more widespread.

a. **Is it typical to not take into account the fact that the cost of a rule may decline as the rule is implemented?**

   Agency cost estimates are based upon the knowledge and information that is available at the time the rule is developed. Much of that information comes from the regulated industry, which tends to overestimate the cost of compliance.
   The experience with many rules has been that the cost of compliance are often less than estimated by the agency or industry at the time of the rule's promulgation. In some instances, there are unseen innovations that occur as a result of the rule, in other instances, the rule may lead to a new design or new product that is more efficient or a new production method that increases productivity. These kinds of cost savings are not taken into account when rules are developed.

b. **Could this have an impact on cost-benefit analysis?**
   Yes. Cost estimates often overstate the cost of compliance, while the benefits are often undervalued, since many benefits are hard to quantify.

Key Benefits Ignored

Ms. Fennell's testimony raised an issue that really struck me. When they estimate the costs and benefits of a rule, agencies are expected to calculate the dollar value of a life. Putting aside for a second whether we can appropriately and accurately put a dollar value on life, what strikes me is what gets ignored in this calculation.

One of the main harms that could be addressed by the Rear Visibility Rule that Ms. Fennell spoke about is the risk that parents will accidentally back over their own children. Apparently 99 of the more than 220 people killed last year in backovers were children, and most of the time they were backed over by their own parents. Yet the mental anguish of a parent who has just accidentally killed their own child is not considered when agencies decide whether to address this problem.

a. **In your experience, are costs like this frequently ignored? Does this have an impact on the regulatory process?**
   Many of the benefits of regulations are difficult to quantify. For example, workers may be disabled from falls on the job. These disabilities may limit their ability to undertake basic life activities, such as playing with their children. Another example is poultry workers and meatpackers who suffer carpal tunnel syndrome and other

musculoskeletal disorders who are unable to hold their children due to the pain and disability. Under EO 12866, agencies are allowed to consider non-quantifiable benefits, but the fact of the matter is that few do, and these impacts are not considered in setting regulations.

b. **If these costs lead to tangible, economic harms—like depressed parents seeking counseling, dropping out of the workforce, or engaging in destructive behavior—are those costs still ignored?**

None of these types of costs are considered in setting regulations.

The Distributive Impact of Regulation

In his submitted testimony, Dr. McLaughlin wrote about the disproportionate negative effect of regulations on low-income populations. However, you made a compelling argument in your testimony regarding the astronomical costs of healthcare that workers face when they become injured or ill due to unregulated hazards in the workplace. Half of these costs are borne by workers and nearly a third are shifted to society as a whole in the form of public benefits and private health insurance.

a. **As a general rule, have you found that regulations have a regressive effect that harms low-income populations?**
No. My experience has been just the opposite. Many of those individuals who suffer the greatest harm due to hazardous conditions and hazardous exposures are those who are the lowest paid workers and poorest citizens. They have no real choice about what kinds of jobs to work in or where to live. The only way they will be protected from harms like unsafe jobs, hazardous air pollution and lead in the environment is through government regulation.

b. **Your testimony also mentioned the disproportionate risks faced by Latino and foreign-borne workers. Can you say a bit about the impact of regulatory delay on these groups?**
Latino and foreign-borne workers are at higher risk of job fatalities and injuries. They work in some of the most dangerous industries and most dangerous jobs and often are subject to abuse and exploitation. One of the industries with a high number of Latino and foreign-borne workers is construction. In 1994 OSHA issued a fall protection standard for construction, but implementation of the rule in residential construction and roofing was delayed for many years due to employer objections. During this delay, deaths from falls increased particularly among Latino workers in construction. Since the standard was fully implemented, the number of deaths from falls overall, and among Latino workers has declined significantly.

Is Government Regulating More Rapidly?

Mr. McLaughlin and Mr. Batkins suggest in their testimony that the rate at which agencies issue rules has been skyrocketing. They have provided some statistics, but those statistics look at things like the number of pages in a rule or the number of words—not the factors that would tell us whether we are really seeing more stringent regulations. Senator Whitehouse pointed out at the hearing that regulations typically are not removed from the record, but instead, we replace them with new ones that are enforced. As Dr. McLaughlin conceded, counting the number of pages in the federal record can be deceiving since defunct regulations would be part of that calculation.

a. Based on your experience, do you believe we are seeing more rapid regulation?

In the area in which I work, occupational safety and health, there has been no increase in the pace of regulation or the number of regulations issued. In fact just the opposite has occurred. There are fewer regulations being issued and it is taking longer and longer to issue rules. For example, under the Obama administration there have only been 2 economically significant final rules issued since 2009, compared to 3 economically significant rules issued during the second term of the Bush administration. According to a 2012 study conducted by GAO, the average time for developing and issuing OSHA rules is about 8 years. But that doesn't include rules which are still in process, such as OSHA's silica rule which has been under development for 16 years, and the confined space entry standard for construction which has been under development for 20 years and has still not been finalized.

To the extent there has been an increase in the number of rules issued in other areas, this is largely a result of legislation enacted by Congress, including the Affordable Care Act and the Dodd-Frank Financial Reform Act. If Congress wants these and other laws to be implemented, it requires the promulgation of regulations.

Amending Proposed Rules

Professor Steinzor mentioned in the hearing that the Rear-View Visibility rule has been delayed in part because OIRA has requested that NHSTA withdraw the rule. It is appropriate to send rules back that need further analysis and amendments, but they should not unnecessarily be stuck in a cycle of OIRA review.

a. When rules are sent back or OIRA requests that they be withdrawn, do agencies amend them and try again?

In my experience, there are very few rules that are withdrawn and sent back to the agencies. The few that are, seem to go into a black hole at the agency, never to emerge. For example, in January 2011, at OIRA's request, OSHA withdrew a draft final rule that would require employers to check a box on workplace injury and illness logs to identify which injuries and illnesses were musculoskeletal disorders. This rule reinstated a longstanding requirement eliminated by the Bush administration. OIRA wanted OSHA to get more input from small businesses, even though most small businesses are excluded

from OSHA's recordkeeping requirements, and there had been public hearings for anyone who wanted to be heard by OSHA on the rule. OSHA jointly with SBA held special sessions to get small business input. But now more than 2 years later the final rule has not been resubmitted, nor is there any indication as to when it will be issued.

For most rules, the negotiations with OMB over the rule and analyses take place out of the public view, either before the rule is officially sent to OIRA for review, or while the rule is at OIRA often times during an extended review period.

What types of changes are typically incorporated when proposed rules are amended for a second-look from OIRA? What impact do these changes have on the strength of the rule?

Virtually all of the changes that are made to draft rules as a result of OIRA review are changes that weaken the rule. For workplace safety rules, OIRA has insisted on higher exposure limits than OSHA proposed and limiting requirements for exposure monitoring and medical exams to only the most highly exposed workers. OIRA has also tried to get OSHA to change its scientific risk assessments in ways that would reduce the estimated risk to workers so it would justify less stringent standards for toxic substances.

Industry Capture

Ms. Seminario told a compelling story during the hearing concerning a meeting of workers and families who had lost loved ones due to workplace injuries and illnesses with OIRA Administrator Sunstein to talk about the delay in worker health and safety rules. You related Mr. Sunstein's comment that this was a very unusual meeting since average citizens and workers didn't ask to meet with OIRA, and that most meetings were with industry.

a. What impact, if any, does industry capture have on regulatory delay?

One of the common tactics used by industry groups opposed to regulations is to raise objections at every stage of the rulemaking process. By doing so, they hope to drag out the process, delay rules and ultimately block or weaken them. They do this directly with the agencies, through the SBREFA process at SBA, with OIRA and the Congress. Routinely they question agency science and object to agency cost estimates. Often times, industry groups produce their own risk assessments and cost analyses and demand that the agencies respond to them even before there is a proposed rule issued for public comment. Even if industry groups have not "captured" the regulatory agencies, they simply overwhelm the process. Agencies spend huge resources and huge amounts of time responding to and defending against these industry campaigns against regulations, all of which delay the development and issuance of needed protections.

b. How does industry end up with more meetings with OIRA than public interest groups and do you have any suggestions for how to change to this?

The OIRA review process is a Washington, D.C. based activity that is largely inaccessible to the general public. Under the EO, OIRA holds meetings with interested parties upon request, but these meetings are conducted in private outside of the public view. The only record of the meetings is a web posting of the fact the meeting occurred, a list of attendees and copies of any documents transmitted. Meeting attendees are almost exclusively Washington representatives of groups, the vast majority of which are industry trade associations. These industry groups simply have greater numbers of representatives and greater resources than groups that represent the public or workers.

My recommendation is that OIRA hold no meetings with outside groups during the review process. There is no reason for these meetings to be held. If OIRA wants more information on a rule, they should request it from the agencies themselves, not from industry or other groups. The involvement of outside groups should be limited to the regulatory process that is conducted by the agencies. This can and often does include requests for information and input at the pre-rule stage and public meetings and informal hearings, in addition to public comments on proposed rules. The agency rulemaking processes are much more open and accessible and provide greater opportunity for real meaningful input by the public.

Consumers Union Statement on Hearing before the Senate Judiciary Subcommittee on Oversight, Federal Rights, and Agency Action: "Justice Delayed: The Human Cost of Regulatory Paralysis"

"We applaud Chairman Blumenthal for holding this hearing. While we are pleased that several delayed proposals have recently moved, such as a proposed action level on arsenic in apple juice and long-awaited food safety rules, we continue to be concerned that the rear visibility rulemaking and other health and safety proposals remain stuck. In addition, legislation introduced in both chambers threatens to further tie up the process by which federal agencies protect consumers. We urge the Administration to quickly finalize the rear visibility proposal from NTHSA, and we urge Senators to oppose efforts to further tie up vital consumer protection rules through unnecessary analyses, redundant studies, and other delay tactics."

Who Will Run the EPA?

*Lisa Heinzerling**

With President Obama's nomination of Gina McCarthy as the new Administrator of the Environmental Protection Agency (EPA), much attention has turned to her record as the EPA official in charge of air pollution programs, experience as the head of two states' environmental agencies, and views on specific policies and priorities. And with the President's nomination of Sylvia Mathews Burwell to be the Director of the Office of Management and Budget (OMB), attention has likewise turned to her record and experience. Few recognize, however, the tight relationship between the two nominations: the Obama administration's approach to governing will make Ms. Burwell Ms. McCarthy's boss.

Few environmental statutes in this country put the President (or his aides in the White House) in charge of environmental decisions; most give the job to the EPA or, more specifically, its Administrator. Even fewer environmental statutes require rules to be evaluated according to cost-benefit analysis; most specify a different kind of decision-making framework for such rules.

Nevertheless, the Obama administration has continued and deepened a longstanding practice of White House control over EPA rules, with cost-benefit analysis as the guiding framework. OMB is the central player in this structure: it reviews, under a cost-benefit rubric, all agency rules that it deems "major" under executive orders mandating this review. EPA rules deemed major by OMB are not issued without OMB's imprimatur. Thus does the OMB director become the EPA Administrator's boss.

This result would be bad enough, given the tension between it and the legal structures governing environmental policy. But it turns out the OMB itself seems not to want to accept accountability for running U.S. environmental policy. In a new law review article by Cass Sunstein, the former head of the OMB office that acts as the White House's regulatory gatekeeper, Sunstein insists that he actually didn't have very much power.[1] In fact, he says, decisions about rules most frequently turned on other players in the White House, Cabinet heads outside the agency proposing the rule, or even career staff in other agencies or in the OMB itself. In Sunstein's rendering, it appears

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1. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, HARV. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192639.

that everyone is responsible for the shape and scope of environmental policy in this administration. Which means no one is accountable.

In concrete terms, this leaves us unable to know whom to blame when the OMB delays the EPA's list of "chemicals of concern" for almost three years,[2] holds the Occupational Safety and Health Administration's rule on crystalline silica for over two years,[3] does not accept delivery of a notice of new data on EPA's proposal to regulate coal ash impoundments,[4] or insists on extensive, substantive changes to the Food and Drug Administration's new rules on food safety.[5] Perhaps it is the OMB itself, or another office in the White House, or the White House Chief of Staff, or the head of the Department of Agriculture, or a GS-12 at the Small Business Administration.[6] We just don't know.

Part of the reason we don't know is that the Obama administration does not follow its own rules on transparency in the process of OMB review. Two years ago, President Obama issued an executive order reaffirming his embrace of a Clinton-era executive order governing OMB review.[7] The Clinton-era order requires transparency throughout the OMB process; at almost every step of the way, the order – which, again, President Obama reaffirmed in his own executive order on OMB review – requires disclosure of important decision points and documents:

- if an agency plans a regulatory action that the OMB thinks is inconsistent with the President's policies or priorities, the OMB must tell the agency so, in writing;[8]

2. The government website on regulatory review shows that this list has been under review at OMB since May 12, 2010. *See TSCA Chemicals of Concern List*, REGULATORY REVIEW DASHBOARD, http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=2070-AJ70 (last visited Mar. 25, 2013) (pending OMB review as of Mar. 25, 2013).

3. This rule has been under review since February 14, 2011. *See OSHA Occupational Exposure to Crystalline Silica Rule*, REGULATORY REVIEW DASHBOARD, http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201104&RIN=1218-AB70 (last visited Mar. 25, 2013) (pending OMB review as of Mar. 25, 2013).

4. The EPA's website on rulemaking shows that a Notice of Data Availability was sent to the OMB for review on March 12, 2012. *Coal Combustion Residuals generated by Electric Power Plants*, U.S. ENVTL. PROT. AGENCY, http://yosemite.epa.gov/opei/RuleGate.nsf/byRIN/2050-AE81?opendocument (last visited Mar. 25, 2013). Neither the EPA's nor the OMB's website indicates that the rule has been accepted by OMB for review. *Id.*; Search Results, REGULATORY REVIEW DASHBOARD, http://www.reginfo.gov/ (search "RIN" for "2050-AE81" and search "Agency for Environmental Protection Agency) (returning "no results found") (last visited Mar. 25, 2013).

5. Documents showing extensive changes to the FDA's rule on the growing, harvesting, packing and holding of produce for human consumption are available through Regulations.gov at http://www.regulations.gov/#!documentDetail;D=FDA-2011-N-0921-0029. Documents showing extensive changes to the FDA's rule on good manufacturing practice and hazard analysis and risk-based preventive controls for human food are available through Regulations.gov at http://www.regulations.gov/#!documentDetail;D=FDA-2011-N-0920-0014.

6. Sunstein mentions all of these kinds of possibilities in explaining the influences on the OMB process of regulatory review. Sunstein, *supra* note 1, at 17.

7. Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3833 (Jan. 21, 2011) (reaffirming Exec. Order No. 12866 of Oct. 4, 1993).

8. Exec. Order No. 12,866, 58 Fed. Reg. 51735, 51744 (Oct. 4, 1993) at § 6(a)(3)(E)(iii).

- if a dispute arises between the OMB and the action agency over whether a particular rule should issue, and one of these parties requests resolution of the dispute by the President or Vice-President, the OMB must note – in a "publicly available log" – who requested elevation and when;[9]
- if the OMB returns a rule to an agency for further consideration, the Office of Information and Regulatory Affairs Administrator must provide a "written explanation" for this return;[10]
- if a regulatory proposal changes between the time it goes to OMB and the time it emerges, the agency must identify those changes ("in a complete, clear, and simple manner");[11]
- and if the OMB insists on changes to the regulatory proposal during its review, the agency must identify those changes for the public ("in plain, understandable language").[12]

The Obama administration follows almost none of these rules on transparency. The OMB does not explain in writing to agencies that items on their regulatory agenda do not fit with the President's agenda. The OMB does not keep a publicly available log explaining when and by whom disputes between the OMB and the agencies were elevated. Indeed, when the first elevation of an EPA rule occurred in President Obama's first term, I drafted a brief memo for the EPA's docket explaining that elevation had occurred and noting the outcome. The OMB told me in no uncertain terms that the memo must not be made public. Moreover, except in one instance – President Obama's direction to then-EPA Administrator Lisa Jackson to withdraw the final rule setting a new air quality standard for ozone – the OMB has not returned rules to agencies with a written explanation about why they have not passed the OMB review.[13] Instead, the OMB simply hangs onto the rules indefinitely, and they wither quietly on the vine. This is how it comes to pass that a list of chemicals of concern or a workplace rule on crystalline silica lingers at the OMB for years.

Some agencies do post "before" and "after" versions of rules that have gone to the OMB. These redlined documents often feature hundreds of changes. There is nothing here like the "complete, clear, and simple manner" of disclosure contemplated by the Executive Order. There is also often no document that explains which changes were made at the OMB's behest. Where, as Sunstein explains, changes might come from the OMB, from another White House office, from another Cabinet head, or from a career staffer in a

9. *Id.* at § 6(b)(4)(C)(i).

10. *Id.* at § 6(b)(3).

11. *Id.* at § 6(a)(3)(E)(ii).

12. *Id.* at § 6(a)(3)(E)(iii).

13. The website on regulatory review shows only one return letter (on ozone) issued during the Obama administration. *OIRA Return Letters*, OFFICE OF INFO. AND REGULATORY AFFAIRS, http://www.reginfo.gov/public/do/eoReturnLetters (last visited Mar. 25, 2013).

separate agency, the failure to follow the Executive Order's rules on transparency means that no one is ultimately accountable for the changes that occur. Who is responsible, for example, for the hundreds of technical changes made to the EPA's scientific analyses of air quality rules?[14] We simply don't know.

Here, too, the OMB is the stumbling block when it comes to transparency. Agencies know full well that they are not to be too transparent. The OMB reprimanded the EPA when the EPA accidentally posted interagency comments on its proposal to regulate coal ash impoundments.[15] But why shouldn't the public know who is responsible for changing the rules? In fact, without knowing the expertise and affiliation of the kibitzers, it is hard to evaluate their comments.

The problems go deeper still. The OMB maintains a "Regulatory Review Dashboard" that contains a good deal of information about rules under review, how long they have been under review, and so on.[16] It is spiffy and informative, but woefully incomplete. Some rules go to the OMB "informally" and do not appear on the Dashboard at that time. Some rules go to the OMB and appear on the Dashboard only weeks after the agency has sent them.[17] Some items go to the OMB and never appear on the Dashboard.[18] Some rules are done, from the agency's perspective, but the White House prevents their transmittal to the OMB.[19] The truth is, the Dashboard purports to be, but is not, a full picture of the items under review at any given time. Thus it misleads at the same time it informs.

What can be done?

First, Senators considering the nominations of Ms. McCarthy and Ms. Burwell should ask them about the relationship between the EPA and the OMB. They should ask who will be in charge of the EPA's regulatory

14. Wendy Wagner has painstakingly documented such changes in a study prepared for the Administrative Conference of the United States. WENDY WAGNER, SCIENCE IN REGULATION: A STUDY OF AGENCY DECISIONMAKING APPROACHES (2013), *available at* http://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf.

15. *See* CENT. FOR EFFECTIVE GOV'T, CHANGES TO COAL ASH PROPOSAL PLACE UTILITY'S CONCERNS ABOVE PUBLIC HEALTH (2010) (recounting the same episode), *available at* http://www.foreffectivegov.org/node/11041.

16. REGULATORY REVIEW DASHBOARD, http://www.reginfo.gov (last visited Mar. 25, 2013).

17. For example, compare the EPA's report of when it sent its rule on electronic reporting regarding water pollution permits to the OMB, Dec. 22, 2011, to its report on when the OMB "received" the rule, Jan. 20, 2012. *See NPDES Electronic Reporting Rule*, U.S. ENVTL. PROT. AGENCY, http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2020-AA47?opendocument (last visited Mar. 25, 2013) (listing dates for "NPRM: Sent to OMB for Regulatory Review" and "NPRM: Received by OMB"). *See also* Search Results for NPRM Review Status, REGULATORY REVIEW DASHBOARD, http://www.reginfo.gov/ (search "RIN" for "2020-AA47" and search "Agency for Environmental Protection Agency) (showing OMB's received date to be Jan. 20, 2012).

18. *See supra* note 4.

19. Juliet Eilperin, *Obama Administration Slows Environmental Rules as it Weighs Political Cost*, WASH. POST, Feb. 12, 2012, (stating that the White House had not given EPA permission to send a rule on cars and trucks to OMB).

program. They should ask whether we will know who is in charge. They should ask on what basis decisions about environmental policy will be made.

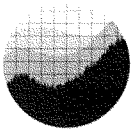
Second, the OMB should follow – and allow agencies to follow – the disclosure requirements of the Executive Order under which its review occurs.

Third, if the OMB decides not to allow a rule to issue, it should return the rule to the relevant agency with a written (and public) explanation as to why it is doing so. It should stop holding onto rules indefinitely. It is not plausible to suggest – as Professor Sunstein has[20] – that long periods of review simply mean that the OMB and the agencies are working hard on getting the rules right. This may be true in some cases, but some of those rules are never going home to the agencies. The OMB should say so and explain why.

Fourth, the OMB should follow the deadlines set out in the Executive Order. The Order quite clearly contemplates that the OMB has 90 days to review rules, 120 if the head of the OMB and the head of the relevant agency agree on an extension.[21] But the OMB takes the position that if the head of the agency asks for an extension, review can continue indefinitely. This is a strained reading of the Executive Order (as Sunstein himself seems to acknowledge).[22] More important, the way the head of an agency often comes to "request" an extension is that she (or her staff) receives a call from the OMB, asking the agency head to ask the OMB for an extension. Thus the OMB has unmoored itself completely from the deadlines set out in the Executive Order; review is over only when the OMB says it's over.

Changes like these would be modest; they would simply bring the OMB into line with the Executive Orders it purports to be following. More substantial changes – such as loosening the OMB's grip on the agencies, ceasing the OMB's meddling with agencies' scientific findings, relaxing the cost-benefit stranglehold on regulatory policy – would also be welcome. But to start, just following the rules laid out by the President himself would be nice.

20. Sunstein, *supra* note 1.
21. Exec. Order. No. 12866, *supra* note 8, at § 6(b)(2)(B),(C).
22. *Id.*



Institute *for*
Policy Integrity
new york university school of law

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A Framework for Addressing Delayed Regulatory Reviews at OIRA

While OIRA has achieved a laudatory record for thorough and efficient regulatory review, occasionally rules remain under OIRA review for far longer than the 90-day timeframe set by Executive Order. For example, OIRA has been reviewing a worker safety rule on silica for nearly 850 days. More than 70 rules currently under review have been pending longer than 90 days.

Careful centralized review is essential to the regulatory process, to ensure that policies maximize social welfare and to facilitate inter-agency coordination. Sometimes conducting an effective regulatory review will take longer than the 90 days allotted by Executive Order. The costs of such delay must be balanced against the potential benefit that additional review may produce better rules. Unjustified delay can harm the public, the agency, and OIRA's reputation:

- Undue delay imposes costs on the public. If OIRA is slow to reject rules that will not ultimately be cost-benefit justified, then it prevents agencies from developing better, more efficient alternatives. If OIRA delays releasing rules that are cost-benefit justified, then intended beneficiaries lose out on vital benefits. For example, the silica rule (and a related mining rule) could help address the hundreds of annual silicosis cases and deaths.
- Delay also creates uncertainty for the regulated industry. Uncertainty can chill otherwise productive investments—including investments in safer, cleaner, more efficient equipment—while investors wait for more information about the future regulatory climate.
- Moreover, delay can damage public perception of OIRA. Some groups continue to view OIRA as an anti-regulatory "black hole," given its past history. Though OIRA has greatly improved its track record for transparency, unexplained delay may undermine that new reputation.

At times, OIRA may need more than 90 days to conduct thorough and effective regulatory reviews. However, OIRA should take steps to prevent unjustified delays and to explain unavoidable ones:

If insufficient information is causing delay, return the rule to the agency to collect more data. Sending the rule back allows the promulgating agency to issue a public request for information and later to resubmit the rule to OIRA after gathering sufficient supporting data. This way, the public can participate in the regulatory process and rulemaking can continue.

If complexity is causing delay, publicly set a new timeline for review. OIRA may need more than 90 days to review particularly complex rules that feature myriad elements and challenging methodological problems. OIRA should publicly acknowledge these delays, explain the need for additional time, and provide an updated, achievable schedule for completing review. Such actions would increase transparency and signal to the public that OIRA has not simply lost track of the rule.

If insufficient resources are causing delay, disclose the shortfall to the public and to Congress. A lack of resources may be temporary due to staff turnover, or longer lasting, as in the case of a constrained budget. Publicizing these situations would increase transparency and help build the case for allocating to OIRA the resources necessary to carry out its review duties.

It is unacceptable to hold rules indefinitely at OIRA for political reasons or due to pressure from special interests. Politically-motivated delays undermine the credibility both of OIRA as a neutral reviewing body and of cost-benefit analysis as a neutral tool for evaluating regulatory policies. Such delays particularly erode OIRA's credibility given its institutional history.

By following these simple steps, OIRA can reduce its backlog of regulatory reviews and mitigate the social costs of undue delay.

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RESEARCH SUMMARY

TEST-DRIVING SOME REGULATORY PROCESS REFORMS

JERRY ELLIG AND ROSEMARIE FIKE

Commentators and legislators have proposed numerous regulatory process reforms that would require federal agencies to conduct more thorough Regulatory Impact Analysis (RIA) for proposed regulations and expand the resources and responsibilities of the Office of Information and Regulatory Affairs (OIRA), which currently reviews executive branch agencies' regulations. In a recent Mercatus working paper, Jerry Ellig and Rosemarie Fike assess the likely effects of regulatory process reforms by examining whether analogous efforts currently undertaken by agencies and OIRA are associated with better regulatory impact analysis and more extensive use of analysis in agency decisions.

Below is a summary of the study's findings. To read the entire paper, see "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis."

SUMMARY

Policy commentators and congressional regulatory reformers have proposed a variety of regulatory process reforms intended to improve the quality and use of regulatory impact analysis by federal agencies. These reforms include:

1. Expanded use of advance notices of proposed rulemaking before the agency writes the regulation
2. Formal rulemaking hearings for regulations whose economic impact exceeds $1 billion annually
3. Requiring the agency to develop a plan for retrospective review of a regulation at the time the regulation is promulgated
4. Requiring agencies to meet with stakeholders before a regulation is proposed
5. Expanding OIRA's budget and staff
6. Requiring independent agencies to conduct regulatory impact analysis and submit their regulations and analysis to OIRA for review

Currently, agencies sometimes do the first four things or undertake analogous efforts. OIRA reviews regulations from executive branch agencies but not from independent agencies. The study assesses how these reforms might affect the quality and use of regulatory impact analysis by testing to see whether current, analogous efforts are associated with higher-quality analysis or greater use of analysis in decisions. The authors measure the quality and use of analysis with 2008–10 scores from the Mercatus Center's Regulatory Report Card, which assesses the quality and use of regulatory impact analysis for economically significant, prescriptive federal regulations.

The study found that:

- Several types of agency efforts that expand pre-proposal information gathering are associated with higher-quality RIAs and greater claimed use of analysis in decision making. These include a prior Notice of Proposed Rulemaking (NPRM) in the same regulatory proceeding, a public request for information by the agency, and consultation with state, tribal, or local governments.
- Two other pre-proposal efforts—public meetings and advisory committees—do not appear to improve the quality and use of analysis and may even diminish them.
- An agency's commitment to hear feedback on the regulation at a hearing or other public meeting in the future is associated with more extensive explanation of how the agency used the analysis in its decisions.
- Regulations resulting from a legislative requirement that the agency review a previous rule are accompanied by higher-quality analysis.
- The longer OIRA's review time, the higher the quality and use of regulatory analysis by the agency. The greater OIRA's influence in the administration (measured by whether the administrator is a political appointee or acting administrator), the higher the claimed use of regulatory analysis.

CONCLUSION

Based on this analysis of recent experience, the authors conclude that it is likely that expanded use of advance notices of proposed rulemakings, formal public hearings, and requirements that agencies articulate a plan for retrospective review would produce higher-quality analysis and increase the use of analysis in decisions. Expanding OIRA's resources and role would also likely improve the quality and use of analysis. Mandatory public meetings with stakeholders before a regulation is written, however, may not improve the quality or use of analysis.

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RESEARCH SUMMARY

THE REGRESSIVE EFFECTS OF REGULATION: Who Bears the Cost?

DIANA THOMAS
Assistant Professor of Economics, Utah State University

In a market economy, regulations are often thought of as a useful tool in correcting the imbalance of power between large, entrenched interests and consumers. Federal agencies are supposed to create universal rules of the road that protect the health, safety, and welfare of customers and employees, secondary considerations for companies focused on profits. Recent Mercatus Center research casts doubt on whether the regulatory process actually achieves these goals.

In her study "Regressive Effects of Regulation," Diana Thomas illustrates an important fact about regulation: those who are least able to afford it are often forced to bear the costs, while seeing relatively few benefits. Thomas's research highlights the dangers of regulating without considering the real-world impacts on consumers, particularly the poorest and most vulnerable.

Thomas notes that regulations often burden low-income households disproportionately, either by increasing costs of goods and services, lowering wages, or both. Consequently, the most vulnerable households have less money on hand to implement the choices that would improve their welfare the most.

Below is a brief summary of Thomas's paper. To read it in its entirety and learn more about the author, see "Regressive Effects of Regulation."

HURTING THOSE WE'RE TRYING TO PROTECT

While there is plenty of debate about what, exactly, federal regulation should try to accomplish, most would agree that regulation should not make society's most vulnerable individuals less safe. Unfortunately, that is exactly what happens sometimes.

Low-income households benefit the most when they act to reduce their exposure to the greatest risks they face, such as relatively common events and activities that cause illness, injury, and death, many of which can be traced to living in unsafe neighborhoods. In contrast, high-income households generally focus more on small risks—for example, tiny environmental risks that are far less likely to occur and generally affect fewer people at the exposure levels regulations address.

LOWER INCOME HOUSEHOLDS BEAR MORE OF THE COSTS OF REGULATION

Regulation focused on small risks delivers benefits to a limited group but spreads the costs across everyone. As a result, regulation effectively transfers money from low income households, who need to prevent larger risks, to high income households, who are concerned about small risks. Low income households are, in a sense, paying for the lifestyle preferences of the wealthy.

Such regulation increases consumer prices and lowers worker wages.

- Regulations act like a regressive sales tax, with middle and lower income households bearing much of the cost of rules that focus on the risk preferences of wealthier households, since they all pay the same, higher prices.
- Cost of regulation as a share of income is estimated to be as much as six to eight times higher for low-income households than for high-income households.
- Thomas estimates that households can mitigate the same level of mortality risks privately for about one fifth of the cost of public risk-reduction strategies.

PRIVATE RISK MANAGEMENT IS SUPERIOR

The most powerful tool for improving health and safety is a consumer's ability to use his or her own money to purchase the goods and services that best serve the individual's needs. Private decisions about risk management are capable of solving a wide range of health and safety issues facing consumers, while public risk management through regulation often focuses on narrow issues.

- A consumer making the decision to move to a different neighborhood may enjoy numerous benefits, ranging from lower rates of violent crime to better-performing schools, resulting in a simultaneous reduction in multiple risks.
- Public risk management forces consumers to expend limited resources on complying with a mandate, such as the one requiring rearview cameras in cars, that benefits people in a few, very specific, situations, and does nothing to address the highest risks facing the poorest households.

SUGGESTED SOLUTIONS

Regulators must consider the unintended consequences and hidden costs of their rules. This requires an active effort to understand who ultimately bears the costs of regulation.

- Regulations should respect an individual's ability to determine their own needs and work to improve the options of consumers rather than limit them.
- Policy makers should consider whether the costs expended on reducing tiny risks with public health and safety regulation could be better spent by households more cost-effectively for larger risks.
- Policy makers should consider not only the total costs of regulation, but who will actually be forced to bear those costs. This is superior to any attempts, post enactment, to compensate for losses caused by the regulation, which will further complicate assessments of benefits and costs and interfere in risk mitigation that is better left to individuals who know their own risks best.

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